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HUBLEY HUNTER, a Minor, by
Maude Hunter, his Next Friend,
Appellee,

vs.

YOUR CAB COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment of \$2,000, entered upon the verdict of a jury in a personal injury case. Plaintiff was injured while riding in one of the taxicabs belonging to defendant.

Whether the accident was caused solely by the negligence of defendant's driver or whether there was contributory negligence on the part of the plaintiff is not argued. That the proof was sufficient to impose liability seems to be conceded.

Defendant makes the point that it was not a common carrier in this instance, and that the court erroneously instructed the jury upon the theory that it was. There are two answers to this.

Plaintiff's declaration alleged in many counts that defendant was a corporation owning taxicabs and on the day of the accident was engaged in the business of operating taxicabs in Chicago and engaged in the business of carrying and transporting passengers for hire in said taxicabs in Chicago, and was a common carrier of passengers; and that plaintiff became a passenger in one of said taxicabs for a reward paid or promised to be paid to the defendant. Defendant filed a plea of general issue and a special plea alleging that it did not own, operate or control the automobile alleged to have caused the accident. This special plea was subsequently abandoned and the ownership of the taxicab by defendant

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

EMILEY HUNTER, a Minor, by
Hazel Hunter, his Next Friend,
Appellee,
vs.
YOUNG GAS COMPANY, a Corporation,
Appellant.

MR. JUSTICE MORSEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment of \$2,000, entered upon the verdict of a jury in a personal injury case. Plaintiff was injured while riding in one of the taxicabs belonging to defendant.

Whether the accident was caused solely by the negligence of defendant's driver or whether there was contributory negligence on the part of the plaintiff is not argued. That the proof was sufficient to impose liability seems to be conceded.

Defendant makes the point that it was not a common carrier in this instance, and that the court erroneously instructed the jury upon the theory that it was. There are two answers to this.

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was admitted and testified to by defendant's employees.

It has been held repeatedly that in an action on the case the general issue denies only the wrongful act alleged to have been committed and does not put in issue the ownership, possession or operation of the property or instrumentalities which caused the injury. Such allegations are regarded as matters of inducement only, which are not traversed by a plea of general issue, and if the defendant desires to take issue on such particular facts he must do so by special plea. Mueller v. Hayes, 321 Ill. 275; Carlson v. Johnson, 263 Ill. 556, and cases cited therein. If defendant desired to question plaintiff's allegation as to the character of its business and that it was a common carrier for hire, this should have been done by special plea.

Another sufficient answer is that the evidence proves that defendant was engaged in operating taxicabs. There is no evidence in the record that it operated a public garage or hired out private automobiles or did a livery business. The witnesses refer to the "taxicabs" of the defendant company, and the only reasonable conclusion from the evidence is that it was engaged in the ordinary business of operating taxicabs.

In Boiland v. Gay, 261 Ill. App. 359, it was held that the company operating taxicabs is a common carrier. See also Babbitt on Motor Vehicles, section 629. Terminal Taxicab Co. v. Kutz, 241 U. S. 252, holds that a corporation organized for the carriage of people may have two separate and distinct businesses - one where it conducts a livery business only with private automobiles and can accept or reject customers and make charges as it wishes. In such business the company is not a common carrier subject to the control of the Utilities Commission; but said company may also own and operate ordinary taxicabs for the hire of any one applying, and in such business it is operating as a common carrier.

Defendant in a supplemental brief complains of the instruction given at the instance of a co-defendant on the ground that it directed a verdict and told the jury that the defendant, Your Cab Company, operated its taxicab in a negligent manner. We do not think the instruction is open to the objection made. The conclusion of the jury must be based upon its findings from the evidence. Furthermore, the mandatory part of the instruction told the jury that it should find both defendants not guilty, which was favorable to the defendant Your Cab Company. If an instruction is erroneously favorable to one defendant, he cannot complain. Bowers v. Heflebower, 243 Ill. App. 129; Welsh v. City of Chicago, 523 Ill. 499.

In any event, the evidence and the facts so clearly support the verdict and judgment that rulings on instructions, although technically erroneous, will not reverse. Taking the instructions as a whole, the jury was properly instructed, and under the evidence no other verdict could have been properly returned. Under the circumstances, the errors, if any, were harmless and do not work a reversal. Greinke v. Chicago City Ry. Co., 234 Ill. 564; West Chicago Street Ry. Co. v. Maday, 188 Ill. 308.

The appellee asks for statutory damages, alleging that the appeal was brought for delay. There is some basis for this motion, but we are inclined to think that the question raised on appeal has sufficient merit to justify us in declining to impose statutory damages.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

PETER BOHARSKI, a Minor, by
Michael Boharski, his Father
and Next Friend,
Defendant in Error,

vs.

STEVE RUDNICKI,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks the reversal of a judgment against him for \$8,000 entered upon the verdict of a jury, after plaintiff remitted \$2,000, in an action to recover damages for injuries received by Peter Boharski, a minor, when he was struck by an automobile owned and driven by the defendant.

The accident happened on November 1, 1924, about nine o'clock in the morning, as defendant was driving his automobile westward on 93rd street, at the intersection of Woodlawn avenue, which runs north and south in Chicago. Plaintiff at this time was twelve years of age. There is some variance in the testimony as to whether plaintiff was struck as he was walking from the north-east corner of the intersection southward across 93rd street on the cross-walk, or, as claimed by defendant, as he was running diagonally in a southwesterly direction across the intersection of the streets. However, the jury could properly find that plaintiff looked eastward before starting to cross and was struck as he was walking southward on the cross-walk on 93rd street. He testified that he did not see defendant's automobile until it was five feet away from him. Defendant's automobile was approaching at a speed of about twenty-five miles an hour; he did not see plaintiff until the latter was two feet ahead of the automobile and he did not blow his horn until plaintiff was struck.

It is first argued that there is no evidence to sus-

tain the count of the declaration alleging that defendant wilfully and wantonly struck the plaintiff.

"Ill-will is not a necessary element of a wanton act, but to constitute such an act the party acting or failing to act must be conscious of his conduct and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury."

Bernier v. Illinois Central R. R. Co., 296 Ill. 464. Whether the injury was wantonly and wilfully inflicted was a question of fact for the jury to determine, and there was sufficient evidence to justify the conclusion that defendant, from his knowledge of the surrounding circumstances and conditions, must have known that his conduct naturally or probably would result in injury.

Illinois Central R. R. Co. v. Leiner, 202 Ill. 624; Brown v. Illinois Terminal Co., 319 Ill. 326.

Complaint is next made of the admission of evidence as to the hospital, medical and surgical bills. It is said that the father is the only person who has a right to recover for loss of services and expenditures incurred on behalf of a minor.

Richardson v. Nelson, 221 Ill. 254. However, the parent may relinquish his right to the earnings of the child, and this may be inferred from the conduct of the parent. 21 Am. & Eng. Ency. of Law, 2nd ed. 1059. It has been held that the prosecution of a suit in the name of a child by the father as next friend is an equivalent to a relinquishment on the part of the father of the authority to collect or claim such earnings in his own right.

Chicago Screw Co. v. Weiss, 203 Ill. 536; Scott v. White, 71 Ill. 287; American Car & Foundry Co. v. Hill, 226 Ill. 227. In the case at bar the relinquishment by the father is not a matter of inference alone. The declaration specifically avers that the father "had assigned, transferred and relinquished his right to recover for monies expended, incurred and to be expended and laid out in the future for medical services, hospital services, surgical

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the fact of delivery on receipt of goods in industry.

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It is the policy of the Government to encourage the development of the oil and gas resources of the United States and to ensure that the production and distribution of these resources is in the public interest. The Government has a number of programs and agencies that are involved in the oil and gas industry, including the Federal Energy Regulatory Commission (FERC), the Department of the Interior, and the Environmental Protection Agency (EPA). The Government also has a number of laws and regulations that govern the oil and gas industry, including the National Energy Policy Act of 1992 and the Energy Policy Act of 2005.

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DATE 07-28-2001 BY 60322 UCBAW/SJS

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Security Establishment in Canada.

and medical treatment, nursing and medicines for said plaintiff and has assigned, transferred and relinquished his right to recover for any wages and earnings during the minority of said plaintiff."

It is suggested, but not argued, that it was error to permit the attending physician to give his opinion that the function of the plaintiff's leg was impaired at least forty to fifty per cent. In what respect this was objectionable is not stated. The physician was the attending physician and based his opinion upon the objective symptoms which came under his observation.

Complaint is made by defendant's counsel of the conduct of plaintiff's attorney on the trial. There was considerable unnecessary talk between the lawyers upon the trial and each seemed to be attempting to get the better of the other in the exchange of remarks. Whatever impropriety there may have been in the remarks of plaintiff's counsel was provoked by the remarks of defendant's counsel. These remarks, while intemperate and uncalled for, under the circumstances do not call for a reversal.

Complaint is made of the instructions, but we find nothing prejudicial in this respect. Taken altogether the instructions fairly presented the law to the jury.

No substantial reason appears for a reversal and the judgment is therefore affirmed.

AFFIRMED.

Matchett, E. J., and O'Connor, J., concur.

and the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference in the internal affairs of other countries. The Government has also been unable to secure the necessary funds to carry out its policy of non-interference in the internal affairs of other countries. The Government has also been unable to secure the necessary funds to carry out its policy of non-interference in the internal affairs of other countries.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. This is a serious omission, as the Commission is required to report on the activities of the CLPE in the United States.

1. The first part of the report is a general statement of the purpose of the study.

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99 - 31707

IN THE MATTER OF THE ESTATE OF
ADOLPH L. BENNER, Deceased,

MARY LEE COLBERT (Claimant),
Appellee,

vs.

ESTATE OF ADOLPH L. BENNER,
Deceased,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of Mary Lee Colbert for \$2500 against the estate of Adolph L. Benner, deceased, entered upon a trial by the court.

The claimant, Mary Lee Colbert, is an attorney and was associated in his lifetime with Adolph L. Benner, also an attorney, in a number of legal matters. Her claim is based on legal services rendered to him and his clients, at his request, in the last months of his life. Twenty-five separate matters are presented as having been attended to by her for the deceased, and she alleges that altogether she spent a little over ninety-six days in such matters which she valued at \$50 a day, amounting to \$4825. February 14, 1921, she received a letter from Benner enclosing a check for \$800 "to apply on account of services." She claimed a balance due of \$4025. The position of the executrix of the estate is that this payment of \$800 and the law practice of deceased which claimant took over, are ample compensation for the work done by claimant. Claimant herself as an interested party could not testify on the trial, but sought to establish her claim by the testimony of various witnesses and by documents. After hearing the evidence, the trial court was of the opinion that \$2500 would be a fair compensation to claimant for her services and entered judgment in her favor for that

IN THE MATTER OF THE ESTATE OF
ALICE J. BROWN, Deceased,
—
LAST WILL AND TESTAMENT (Administrators),
—
vs.
—
JAMES H. BROWN, Plaintiff,
—
Defendant.

ADMINISTRATORS' ACCOUNT DUE
ON COURT EXAMINATION.

23. FURTHER ACCOUNTS RELATING THE ESTATE OF THE DECEASED.

This is an appeal from a judgment in favor of James H. Brown for \$2500 against the estate of ALICE J. BROWN, Deceased, entered upon a writ by the court.

The deceased, JAMES H. BROWN, is an attorney and was associated in his lifetime with ALICE J. BROWN, also an attorney, in a number of legal matters. Her claim is based on legal services rendered to him and his estate, at his request, in the last months of his life. Twenty-five separate matters are presented as having been attended to by her for the deceased, and the bill therefor aggregated the sum of a little over ninety-six days in such matters, which was valued at \$75 a day, amounting to \$4230. February 14, 1931, she received a letter from James enclosing a check for \$500 "in reply on account of services." She retained a balance due of \$3730. The position of the executor of the estate is that this payment of \$500 and the few minutes of deceased which elapsed back thereon, are ample compensation for her work done by him. Disallowance and details as an interested party could not testify on the trial, but account to establish her claim by the testimony of various witnesses and by documents. After hearing the evidence, the trial court was of the opinion that \$500 would be a fair compensation for the work done by her services and entered judgment in her favor for that

amount.

The only question argued by the attorneys for the estate is that the claimant has failed to substantiate her claim by the preponderance of the evidence. Their brief is almost wholly an abstract of the evidence of the witnesses. These touch some twenty-four different matters and an item of sundry consultations with Benner. It would serve no useful purpose to detail the evidence as to each of these matters. It is extended and, in some cases, involved.

One matter was services alleged to have been rendered in the estate of John B. Merkel. It appears that, when Benner called in claimant to finish up the legal matters in connection with this estate, it had been pending in the Probate court for a great many years and the heirs had made repeated efforts to obtain an accounting and distribution of the money. Claimant proceeded to gather the necessary data and prepared a final account consisting of five or six pages. Objections were made to this and the account was redrawn. While there is some evidence tending to show that in this estate there was some loss or inconvenience, this was because of Benner's failure to handle promptly the affairs entrusted to him. Miss Colbert seems to have handled the matter with diligence and skill.

Another matter was the estate of Mary Schneider, deceased, being a proceeding in the Probate court and a trust estate. In this case also the final account was about four years overdue when claimant's services began. The account covered a long period of time and involved many items. These were prepared by claimant, and while there was no direct evidence as to the time spent by her, the trial court could reasonably infer that the time covered was at least fourteen days, as was set forth in her claim.

It would unduly extend this opinion to comment on each

The only question raised by the evidence for the estate is that the claimant has failed to establish her claim by the preponderance of the evidence. This point is almost wholly irrelevant to the question of the claimant's liability for some twenty-four different matters and in fact of every consequence with Bonner. It would serve no useful purpose to detail the evidence as to each of these matters. It is sufficient and, in some cases, sufficient to say that the evidence is against the claimant. The matter was decided in favor of the claimant in the case of John W. Bonner. It is stated that, when Bonner called in claimant to finish up the legal matters in connection with his estate, it had been decided in the Federal court for a third party years and the Bonner had made repeated efforts to obtain an accounting and distribution of the money. Claimant proceeded to gather the necessary facts and prepared a final account consisting of five or six pages. Objections were made to this and the account was returned. While there is some evidence tending to show that in this estate there was some loss of income taxes, this was because of Bonner's failure to make properly the estate's returns to him. Also without even to have called the matter with claimant and child. Another matter was the estate of Mary Bonner, deceased, being a transaction in the Federal court was a trust estate. In this case also the final account was about four years overdue when claimant's services began. The account covered a long period of time and involved many items. There were several objections, and while there was no direct evidence as to the time spent by her, the final account was substantially later than the one covered and as such was not in fact a final account. It would hardly be fair to say that the matter is covered on each

of the many matters in which the claimant rendered services. It is sufficient to say that the evidence on behalf of claimant tends to support her claim in each of the matters concerning which evidence was introduced.

A reviewing court is not called upon to substitute its judgment for that of the trial court, but only to determine whether the finding or verdict is manifestly contrary to the weight of the evidence. This is the well established rule. Upon examination of the entire record we conclude that, while the proof of certain items of alleged services rendered may be somewhat doubtful and at other times not clear, yet taking the record as a whole we are unable to arrive at the conclusion that the trial court's finding is manifestly against the weight of the evidence.

That services were rendered seems to be conceded. Claimant is entitled to fair compensation. There appears to be no dispute as to the rate of compensation allowed. The trial judge had the right, from certain facts established, to draw his own conclusions as to the reasonable amount of time necessary to perform the work. His long experience both as a lawyer and judge on the bench well qualified him to do this.

We would not be justified in disturbing his conclusions, and the judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

of the many matters in which the witness rendered services. It is sufficient to say that the witness on behalf of defendant found to be a person of high character and of the highest moral and intellectual attainments.

A reviewing court is not called upon to determine its propriety for what of the trial court, but only to determine whether the finding or verdict is manifestly contrary to the weight of the evidence. This is the well established rule. Upon examination of the entire record we conclude that, while the proof of certain items of alleged services rendered may be somewhat doubtful and at other times not clear, yet looking the record as a whole we are unable to reverse it for any reason other than the fact that the witness's testimony was manifestly against the weight of the evidence. That services were rendered seems to be conceded.

Claimant is entitled to fair compensation. There appears to be no dispute as to the rate of compensation allowed. The trial judge had the right, from certain facts established, to draw his own conclusions as to the reasonable amount of time necessary to perform the work. His fact conclusions were as a lawyer and judge on the bench well qualified to do this.

It would not be justified in awarding him compensation, and his judgment is therefore affirmed.

REVEREND

Respectfully,
J. J. Conner, J., Clerk.

IN THE MATTER OF THE ESTATE OF)
 HERMAN STEINMEYER, Incompetent,)
 Appeal of HERMAN STEINMEYER,)
 Appellant.)

APPEAL FROM CIRCUIT COURT
 OF COOK COUNTY.

MR. JUSTICE MAGURNY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Herman Steinmeyer from a judgment of the Circuit court entered upon the verdict of the jury finding him incompetent to manage and care for his own estate.

In November, 1925, Herman Steinmeyer's two married daughters, Jennie DeGrazia and Anna Miller, filed a petition in the Probate court of Cook county alleging that their father was incompetent to manage, control and care for his property and affairs. A trial was had in December, 1925, and the jury found that the respondent was an incompetent person, incapable of managing and caring for his estate. Judgment was entered upon the verdict and an appeal therefrom was prayed to the Circuit court. Thereafter, on December 23, 1926, a jury in the Circuit court returned a like verdict, finding that respondent was an incompetent person, and respondent has appealed.

The facts developed on the hearing are that at the time of the trial in the Circuit court Herman Steinmeyer was nearly seventy-one years of age. About thirty-five years before he had met with an accident which necessitated the amputation of both legs above the knees. He and his brother Gustav conducted a small hardware store on Cottage Grove avenue, living in rooms above the store. All the outside work was attended to by Gustav, while the respondent looked after the work in the store. Gustav died in August or September, 1925. October 20, 1925, respondent suffered a paralytic stroke involving his entire right side, and

the petitioners claim that his incompetency arose at that time. He is an illiterate man, unable to read and write except in a most limited way. His native tongue is German, although he can understand ordinary and simply spoken English. As a result of the stroke he lost the ability to speak except a few simple German words, and this inability continued until the time of the trial in the Circuit court. He is the owner of two pieces of real estate and some personal property aggregating approximately \$60,000 in value. At the time of the death of his brother Gustav and for a number of years prior thereto, Clara Lena Hammacher acted as housekeeper for both of them, coming into their home a number of days each week and returning to her home at night. After Gustav's death her attendance was more constant.

The daughters who filed the petition are married and live in their respective homes, some considerable distance from the home of their father. Their relations seem to have been amicable until the latter part of 1925.

In the early part of the afternoon of October 20, 1925, respondent suffered the paralytic stroke, and a few hours later Mrs. Hammacher called in Dr. Abbott, who attended respondent. A few hours after the stroke and on October 20th respondent and Mrs. Hammacher were married. There is evidence that immediately thereafter he made a will and delivered a deed of trust of all of his real estate and entered into a long and complicated trust agreement, whereby all but \$2,000 of his estate was devised and given after his death to Mrs. Hammacher and her twenty-six year old daughter.

On the evening of October 21st Mrs. Hammacher (then Mrs. Steinmeyer) called respondent's daughter, Mrs. DeGrazia, on the telephone and informed her that her father was ill. Mrs. DeGrazia went to see her father the next morning and there learned for the first time that her father had suffered a stroke of paraly-

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sic. She informed her sister, Mrs. Miller, who also called to see the father. Mr. DeGrazia, the husband of one of the petitioners, on October 22nd arranged with a Dr. Schultz to call at the Steinmeyer home that night, and the daughters and their husbands with the Doctor called on the evening of October 22nd. At this time they did not know that respondent and Mrs. Hammacher had been married, but then learned of the ceremony. They found Steinmeyer in an unconscious condition in a small room which was very dirty and filthy. The room was without heat, light or proper ventilation, and was filled with a disagreeable odor. The daughters suggested that he be removed to a hospital and a nurse employed, but Mrs. Steinmeyer refused to permit this. Shortly after the 1st of November the daughters were refused admittance to see their father by Mrs. Steinmeyer, who also refused to allow Dr. Schultz to treat the patient. Thereafter a habeas corpus proceeding was instituted by Mrs. DeGrazia in the Superior court, as a result of which the court ordered that the daughters be permitted to visit their father and that a trained nurse be employed to take care of him. He continued in the care of this nurse until the early summer of 1926, when he was permitted to go down stairs into the store, where a cot or bed was provided for him in the rear part of the store.

Upon the hearing in the Probate court of the present petition the daughters learned for the first time of the various legal documents which had been executed by Steinmeyer on the night of October 20, 1925. Respondent did not attend any of the court proceedings nor was his testimony taken in any way.

The first point made by respondent in this appeal is that the statute requires the appeal to be taken to the Circuit court, where the cause is tried de novo. This will be conceded as a matter of course. However, it is apparently argued that it was error for the Circuit court to admit any evidence of the con-

dition of respondent prior to the date of the trial, namely, December 23, 1926, as the finding of the jury must be as to respondent's competency on that date. It is a commonplace in the diagnosis of diseases for physicians to obtain the history of the case and their conclusion is based largely upon such history. We cannot conceive of any reasonable theory which would have justified the trial court in excluding the history of respondent's case, with special reference to the paralytic stroke of October 20, 1925, and the resulting consequences. This would seem too obvious to require argument.

The only two remaining points of respondent's brief are (1) a correct statement of the test in determining whether a conservator should be appointed, namely, whether such person was and is of such mental soundness and capacity as to enable him to intelligently transact the ordinary business and affairs of life; and (2) a grantor mentally capable of transacting business is competent to make a deed. Both of these may be conceded as abstract propositions.

The real question is whether, upon the evidence presented, the jury in the Circuit court properly could find that respondent was an incompetent person. Our general statement of facts would seem to be sufficient to prove his incompetency. He was an old man with both legs amputated when he suffered the paralytic stroke on October 20, 1925. Dr. Schultz, who saw him on October 22nd, testified in detail as to his condition - that he was completely paralyzed on the right side, the right side of his face bulging, pupils contracting; that he was in a semi-conscious state as a result of a hemorrhage of the brain; that he could be aroused only by shouting at him, and then he could respond only with a guttural grunt; that he could not talk. The Doctor stated that in his opinion "he was not competent to judge or do anything. *** He was not able to do anything. He could

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not move;" that he did not have sufficient mental ability to execute any contract. A week after October 22nd Dr. Schultz again saw the respondent and found him improved so that he was able to move his fingers and to articulate slightly; he could not articulate the word "yes" but only the word "no."

A Mr. Koenig, lawyer at the Chicago bar, saw the respondent on October 29th and tried to talk with him in German, but he could not talk. He could utter sounds but they were not intelligible. "He knew something was going on, but he could not understand what was going on and what was being done."

Mr. and Mrs. DeGrazia saw him in January and February, 1926, and testified that in their opinion he was not competent. Mr. and Mrs. Miller saw him as late as November 4, 1926, and both testified that he had been incompetent from the time he suffered the paralytic stroke up to November 4, 1926. All of these witnesses corroborated one another as to the facts and circumstances which they observed and upon which their opinions were based. A witness testifying for the respondent stated that his condition in November and December, 1926, was unchanged.

A number of incidents were detailed tending to show incompetency. One was in the fall of 1926, when respondent was unable, even with the assistance of Mrs. Steinmayer and Mr. and Mrs. Miller, to explain the difference between a 50¢ and a 75¢ knife which a prospective customer wished to purchase. He could not recognize the names of buildings across the street from his place of business. He still occupies a bed in the store.

There was some contrary evidence, including the testimony of a Dr. Jacobson as to certain tests which he gave respondent. These were limited in character and concerned matters connected with the hardware store and stock. The jury evidently was of the opinion that respondent's responses to these tests

were automatic and had become a matter somewhat of second nature with the respondent. No tests were applied for determining respondent's ability to transact outside business and to look after his property and estate. Dr. Jacobson, however, admitted that when he testified both before Judge David in the Superior court and Judge Horner in the Probate court, he expressed his opinion that respondent was incompetent.

It is significant to note that neither Dr. Abbott, who was first called to treat respondent, nor the physician who succeeded Dr. Schultz, was called as a witness in the Circuit court trial. The respondent was not present at the time of the trial nor was his testimony taken either at the trial in the Probate court or in the Circuit court.

There is no dispute as to the legal rules involved. The only question involved is one of fact. We cannot disturb the verdict of the jury unless we can say that it is clearly against the weight of the evidence, and we not only cannot say this in the instant case, but we are also of the opinion that the evidence amply justified the conclusion of the jury.

The case was properly tried. Two juries have arrived at the same conclusion, and there is no ground for reversal.

The judgment of the Circuit court is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

BERNARD PRESS,

Appellee,

vs.

FIDELITY TRUST & SAVINGS
BANK, a Corporation,

Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE RESPECTFULLY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment of \$2500 entered on the verdict of a jury upon the trial of an action in assumpsit, wherein plaintiff claimed that, in accordance with the terms of a contract with Laura E. Smith, he turned over to defendant, as escrow holder, \$2500 earnest money to be applied upon the purchase by him of certain real estate, but should Laura E. Smith fail to comply with her undertakings under the contract the money was to be returned to plaintiff; that said Laura E. Smith never abided by her part of the contract, but defendant refuses to return to plaintiff the money so deposited.

Defendant asserts that it did not hold the money in escrow, but the contract clearly shows that the money was deposited with it "for the mutual benefit of the parties concerned."

The contract contemplated the purchase by plaintiff from Laura E. Smith of premises with a building at the corner of Francis Place and California Avenue in Chicago, for \$75,000. At the time the contract was entered into Laura E. Smith did not have title to the property, which was in Marie and Frank Irmen, and the contract was made subject to the following contingency: "Fulfillment of this contract is dependent upon Laura E. Smith's getting title through consummation of a contract to purchase from Marie and Frank Irmen." It is admitted that Laura E. Smith never got title to the property; hence the agreement never became a binding contract capable of enforcement, and plaintiff

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was entitled to the return of his earnest money. Regardless of any other considerations, this is sufficient basis for the verdict of the jury. In Krause v. Kraus, 162 Ill. 328, a similar contingent contract was under consideration, and the court said:

"The agreement never became a binding contract capable of enforcement, since it was not approved by the County court until after it had expired and had been repudiated."

A further justification of the judgment is that under the terms of the contract Laura E. Smith did not obligate herself to get title to the property. She could not have been sued for damages if she failed to get title. There was no mutuality in the contract. It was unilateral and void. Olson v. Whiffen, 175 Ill. App. 182.

Counsel for defendant repeatedly asserts that an attorney for plaintiff examined the title and found some objections which were "removed." The record does not sustain this assertion. The opinion of the plaintiff's attorney found title to the property in Marie Irmén and Frank Irmén, subject to some eight important objections, none of which was removed.

As further justification for the verdict of the jury the evidence shows that after the contract between Smith and plaintiff, she entered into a written contract with Frank and Marie Irmén, whereby she agreed to trade property at Winchester and Montrose avenues in Chicago for the property which she contracted to sell to plaintiff, but it also appears that she did not own the property at Winchester and Montrose avenues, but that it was owned by John E. Edmunds, who testified that Laura E. Smith was acting merely as his agent. Subsequently the Irméns by a writing notified Laura E. Smith, John E. Edmunds and others that by reason of the failure of Edmunds and Smith to carry out their contract with them, they (the Irméns) declared it terminated and cancelled. Edmunds thereupon filed a statement in the Recorder's office of

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Cook county, wherein he stated that he and Laura E. Smith claimed an interest in the property in question by reason of their contract with the Irmens. Whatever might be the merits of the controversy between the Irmens on the one hand and Smith and Edmunds on the other, they are immaterial to the present issue. The result was the failure of Laura E. Smith to obtain title to the property contracted for with plaintiff, and hence she never was in a position to convey title to the same.

It is argued earnestly that the plaintiff was first in default, but the facts as they appear in the record do not support this assertion. It was Laura E. Smith, the proposed vendor, who was in default; and even if we assume that the contract was binding, plaintiff was not obliged to pay any money until the proposed vendor tendered a warranty deed of the property conveying a "good and merchantable title thereto."

Complaint is made of certain instructions, but errors, if any, in this respect are not sufficiently serious to justify a reversal. The jury was fairly instructed as to the law, and the verdict is the only one that could have been returned upon the evidence before the jury. Schultz v. Reed, 132 Ill. App. 420; Keeler v. Herr, 157 Ill. 57.

In every aspect of the case plaintiff was entitled to the verdict rendered and the judgment thereon is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

Good news, however, is that the new law is not as strict as it used to be. In fact, it is now possible to obtain a license to sell liquor in a private home. This is a great relief for those who have been suffering from the effects of the new law. The new law is not as strict as it used to be. In fact, it is now possible to obtain a license to sell liquor in a private home. This is a great relief for those who have been suffering from the effects of the new law.

It is also worth noting that the new law is not as strict as it used to be. In fact, it is now possible to obtain a license to sell liquor in a private home. This is a great relief for those who have been suffering from the effects of the new law. The new law is not as strict as it used to be. In fact, it is now possible to obtain a license to sell liquor in a private home. This is a great relief for those who have been suffering from the effects of the new law.

On the other hand, it is worth noting that the new law is not as strict as it used to be. In fact, it is now possible to obtain a license to sell liquor in a private home. This is a great relief for those who have been suffering from the effects of the new law. The new law is not as strict as it used to be. In fact, it is now possible to obtain a license to sell liquor in a private home. This is a great relief for those who have been suffering from the effects of the new law.

In conclusion, it is worth noting that the new law is not as strict as it used to be. In fact, it is now possible to obtain a license to sell liquor in a private home. This is a great relief for those who have been suffering from the effects of the new law. The new law is not as strict as it used to be. In fact, it is now possible to obtain a license to sell liquor in a private home. This is a great relief for those who have been suffering from the effects of the new law.

Respectfully,
J. Edgar Hoover

ALFRED W. GERHARD,
Appellee,

vs.

H. J. EARNEST, W. C. BRYAN,
B. ESPY CURTIS and W. J. TOMKINS,
Doing Business as Tec Development
Company, a Copartnership,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$250 entered upon the trial of an action by plaintiff claiming attorney's fees. It is not controverted that the services were rendered and the charges reasonable. The only things presented are technical matters arising on the trial.

Plaintiff claimed joint liability of the four defendants. Each filed a plea denying that he was a member of the copartnership. The jury brought in a verdict finding the issues against the defendants Earnest and Tomkins and assessing damages. While a motion for a new trial was pending plaintiff presented a motion for leave to dismiss as to Bryan and Curtis and to file an amended statement of claim instantly, which was allowed, said amended statement declaring against Earnest and Tomkins doing business as the Tec Development Company. Tomkins made motions for new trial and arrest of judgment, which were over-ruled and judgment was entered against Earnest and Tomkins.

The point first presented is that there was no evidence showing a partnership between the four defendants, and therefore Tomkins' motion at the end of plaintiff's case to instruct the jury should have been allowed. There was some evidence tending to show that the four men were partners. A paper called a memorandum made by certain parties and Tomkins and Earnest representing the Tec Development Company in process of organization, was introduced.

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There is no question that the evidence presented at the trial was sufficient to establish the defendant's guilt beyond a reasonable doubt. The jury's verdict is affirmed.

While a motion for a new trial was pending plaintiff presented a motion for leave to amend his answer and to file an amended statement of claim. Plaintiff, which was allowed, said amended statement containing against defendant and Thomas being business as the Development Company. Thomas made motion for new trial and extent of judgment, which were over-ruled and judgment was entered against defendant and Thomas.

The point first presented in that there was no evidence showing a relationship between the two documents, and that Love's opinion of the end of the investigation was based on the fact that the two men were partners. A paper called a memorandum was by certain parties the London and New York representing the

Plaintiff testified that Tomkins and Earnest gave him the names of the parties interested in the Tec Company and gave him the name of Curtis, explaining that the initials "TEC" stood for Tomkins, Earnest and Curtis. Plaintiff had interviews with Curtis relative to the business. Bryan is connected by the testimony of two witnesses who met and had dealings with all of the defendants purporting to represent the Tec Development Company.

There is sufficient evidence as to the joint undertaking of the four defendants to be submitted to the jury, and the court properly denied the motion for a peremptory instruction. Furthermore, the defendants introduced evidence and the motion was not renewed at the conclusion of the case.

The action of the plaintiff in filing an amended statement of claim, leaving out Bryan and Curtis, is questioned. There was no impropriety in this. The jury had found against Earnest and Tomkins. Section 39 of the Practice Act provides that at any time before final judgment in a civil suit amendments may be allowed, introducing any party necessary to be joined as plaintiff or defendant or "discontinuing as to any joint plaintiff or joint defendant." The amended statement of claim simply was made to conform with the verdict of the jury and is in accordance with approved practice. Wianer v. Catherwood, 225 Ill. App. 471; Teich v. Ayers, 213 Ill. App. 41; Posvie v. Hartford, 211 Ill. App. 273; Cogshall v. Beesley, 76 Ill. 445. Defendants are not in a position to complain of this action, as they made no motion for leave to plead to the amended declaration. Oberman v. Camden Fire Ins. Assoc., 314 Ill. 264.

This appeal might properly be dismissed. The judgment was against H. J. Earnest and W.J. Tomkins jointly and they were allowed a joint appeal upon filing a joint bond. Tomkins only has filed a bond. Lingle v. City of Chicago, 210 Ill. 600.

The judgment is affirmed.

Matchett, P.J., and O'Connor, J., concur.

AFFIRMED.

A. L. SANDERS,
Appellee,

vs.

GRAND RAPIDS FURNITURE
COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks the reversal of a judgment for \$365.32 entered upon trial by the court in an action whereby plaintiff sought to recover the purchase price and other items because of the alleged failure of the defendant to deliver goods purchased as agreed upon.

Plaintiff testified that in November, 1925, he bought some furniture from defendant, dealing with its salesman, Mr. Fox; that plaintiff told Mr. Fox he wanted the furniture delivered to Shreveport, Louisiana, 1441 Davis street, and saw him write the address on a piece of paper. He was told to ship the furniture in March. The furniture bought amounted to \$242; plaintiff paid \$100 down and subsequently in April, 1926, paid the balance in full. Plaintiff testified that when the balance was paid Mr. Fox told him the furniture would be shipped in ten days, and about a week before the plaintiff left for Shreveport he went to defendant's store and was told by Mr. Fox that the furniture had been shipped; that upon his arrival at Shreveport he did not find the furniture and wrote defendant a letter, to which he received a reply from defendant under date of June 19, 1926, saying that it had not received any letter pertaining to the shipment and asked that plaintiff mail a check for \$142 and the furniture would be shipped. This was after the bill had been paid in full. Plaintiff then returned to Chicago and he and his wife went to see the defendant

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OF THE BUREAU

U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.
JANUARY 10, 1934

THE FOLLOWING INFORMATION RELAYED THE OFFICE OF THE DIRECTOR

Defendant by said report was the receipt of a
letter from the DIRECTOR dated April 10, 1934, in which
whereby plaintiff asked to recover the purchase price and other
items because of the alleged failure of the defendant to deliver
goods purchased as stated above.
Plaintiff further stated that in December, 1933, he bought
from defendant two packages, one of which was a radio set, and
that plaintiff paid \$10.00 for the same. Plaintiff delivered to
defendant, respectively, \$10.00 and \$10.00, and on the same date
appeared on a piece of paper. He was told to ship the radio set in
March. The package being received by plaintiff on April 10, 1934.
From and subsequently in April, 1934, said package was in fact
plaintiff received it and was satisfied and paid \$10.00 for same.
The defendant would be obliged to him for the same, and should a man
before the plaintiff left for defendant he was in defendant's
store and was told by Mr. Tom that the package had been shipped;
that upon his arrival at defendant he did not find the package
and wrote defendant a letter, to which he received a reply from
defendant dated April 10, 1934, saying that it had not
received any letter containing in the package and that the
plaintiff will be glad to ship the package when he wishes.
This was after the 10th day of April. Plaintiff then re-
turned to Chicago and he and his wife went to see the defendant

and were referred to a Mr. Wolf and plaintiff demanded a refund of his money. Mr. Wolf said he would see about it. Plaintiff says this was the only satisfaction he could get. Plaintiff testified that he had never received the furniture.

The salesman who sold the furniture corroborated this in many respects. He testified that the order was in writing, but that the address in Shreveport, Louisiana, was not added until three or four months after the date of the purchase. The written order is not abstracted. This salesman admitted that he had a conversation with Mrs. Sanders over the telephone inquiring when the furniture would be shipped, and he informed her that he did not know the date.

From the evidence the trial court could properly conclude that through some carelessness and mistake on the part of defendant, delivery of the furniture was not made by the defendant. Under such circumstances plaintiff was entitled to a refund of the purchase money paid by him.

The court allowed the plaintiff to testify as to the cost of railroad tickets for himself and wife in going to and returning from Shreveport, and added this to the amount it found the defendant should pay. The evidence did not justify the inclusion of railroad fare as special damages, although the witness testified that he came back to Chicago to see about the furniture. There is no evidence that the trip was necessary and nothing to justify the inclusion of the cost of transportation of his wife.

The judgment was proper as to the amount paid by plaintiff for the furniture, \$242, but improper as to the balance. The judgment of \$365.32 is therefore reversed and judgment for the plaintiff against the defendant will be entered in this court for \$242; the cost of this appeal to be taxed against the defendant-appellant.

JUDGMENT OF \$365.32 REVERSED.
JUDGMENT FOR \$242.00 ENTERED.

Matchett, P. J., and O'Connor, J., concur.

and was referred to a Mr. Wolf and finally returned a return
of his money. Mr. Wolf said he would see about it. Mr. Wolf
said the only collection he would get. Mr. Wolf said
that he had never received the money.

The defendant who said the defendant introduced this
in many respects. He testified that the order was in writing, but
that the address in the order, I understand, was not added until three
or four months after the date of the order. The witness order
is not attached. This defendant admitted that he had a conversation
with Mr. Wolf. He said that the defendant had written to him that
two would be shipped, and he had said that he would not ship
the case.

From the evidence the trial court could properly con-
clude that through some circumstances and without on the part of
defendant, delivery of the defendant was not made by the defendant
and. Under such circumstances defendant was entitled to a return
of the money money paid by him.

The court allowed the plaintiff to testify as to the
cost of delivery of the money and also as to the cost of
transport from New York, and asked that he be allowed to have the
defendant testify to it. The evidence did not justify the inclusion
of testimony that he received money, although the witness testified
that he came back to the office to see about the money. There is
no evidence that the wife was necessarily not notified as to the
inclusion of the cost of transportation of his wife.

The defendant also testified as to the amount paid by him
for the money, and the amount paid by him for the money. The
defendant testified that he received the money and returned the
money to the defendant. The defendant testified that he received
the money and returned the money to the defendant.

WITNESSES:
JAMES H. WOLF, JR.
JAMES H. WOLF, JR.

175 - 31786

NATHAN LICKERMAN,
Appellee,

vs.

THOMAS J. McNALLY,
Appellant.APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover a broker's commission pursuant to an alleged verbal agreement with defendant authorizing plaintiff to procure a tenant for ninety-nine years of certain property owned by the defendant. The declaration alleges that tenants ready, able and willing to execute a lease with defendant were procured by plaintiff, but subsequently defendant repudiated the agreement and the deal was never consummated; that the broker was entitled to the usual Chicago Real Estate Board commission amounting to \$33,686.86. The jury returned a verdict favorable to plaintiff and judgment for the full amount of his claim was entered, from which defendant appeals.

Briefly stated, negotiations were as follows: Lickerman (plaintiff here) sought an interview with McNally, the owner of the property in question. At this time Lickerman was not a licensed real estate broker, although he had applied for a license. After several conferences McNally authorized Lickerman to secure a tenant for ninety-nine years on the basis of \$25,000 a year rental for seven and a half years; \$30,000 a year for seventeen and a half years; \$32,500 a year for twenty-five years; \$35,000 a year for forty-nine years, for which plaintiff says McNally agreed to pay Lickerman the usual Chicago Real Estate Board commission. Subsequently Lickerman introduced McNally to Fred Bernstein as a prospective lessee. There was considerable discussion as to the rental,

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Bernstein insisting that the first year's rental should be \$20,000. The matter of a new building was mentioned and the questions of taxes and insurance. Subsequently Fred Bernstein and his brother Alex met at the office of Frank C. Rathje, McNally's attorney, and there was a desultory discussion of the terms of the lease. An appointment was made to have all parties meet at a subsequent date in Rathje's office. At this latter meeting were present McNally, Lickerman, Fred and Alex Bernstein and Rathje. The first stumbling block seems to have been the first year's rental, McNally insisting on \$25,000 and the Bernsteins on \$20,000. A second meeting was had between the parties in Rathje's office, at which time, Lickerman testified, McNally agreed to accept \$20,000 as the rental for the first year. The parties discussed in general terms the cost of a new building to be erected by the lessees, the rentals, taxes and insurance. It seems to have been agreed that \$25,000 was to be put up as a deposit by the prospective lessees. No definite arrangement was ever made with reference to many important items. The talk was in general terms, as is usual in such negotiations. Rathje stated that he would make an effort to draw a lease and submit it to the prospective lessees for consideration. Some dispute arose between Lickerman and Rathje about the amount of the commission if the deal went through. No lease was submitted and the deal was never consummated.

The defendant first points out that the evidence discloses that the plaintiff was financially interested with the Bernsteins in the deal and did not inform defendant of this; hence he was guilty of bad faith as an agent for the defendant and, therefore, as a matter of law, he cannot recover a commission. The evidence shows that Lickerman proposed to Fred Bernstein that he was to come in on one-third of the deal and put up one-half of the \$25,000 to be deposited as security; that Bernstein made a

counter-proposition that if the deal went through Lickerman was to have a one-quarter interest in the lease, Lickerman to furnish \$12,500, or one-half of the deposit money. This arrangement between the Bernsteins and Lickerman was never disclosed to McNally. It is not disputed that Lickerman had an interest with the Bernsteins in the proposed lease, and the only reply presented is that this interest was acquired after the parties had agreed upon all the terms of the lease and Lickerman's work was done. The record does not support this. The agreement with the Bernsteins was made during the time when the negotiations were in progress. It is a fair inference from Lickerman's conduct in the matter that he was not so much interested in securing the terms suggested by his principal, McNally, as in securing terms less advantageous to McNally. Lickerman seemed to have worked earnestly to have McNally name a lower rental and to agree to the Bernsteins' request that the first year's rental be \$20,000. Furthermore, it was at first figured that, in order to secure the desired gross rentals it was necessary to have a building costing in the neighborhood of \$175,000; yet Lickerman worked earnestly with McNally and finally secured an agreement from him to be content with a \$75,000 building. There are many other details in evidence, all of which lead to the conclusion that Lickerman, while purporting to act as the agent of McNally, was in fact working to secure from him the best possible terms in the interests of himself and the Bernsteins.

The law is well settled that under such circumstances an agent or broker cannot receive commissions from his principal; that he cannot form an arrangement with a third party to purchase from his principal; and that he is prohibited from having any interest, direct or indirect, in a proposed transfer of property without the consent of his principal, who must have full knowledge of the interest of the agent. Cotton v. Holliday, 59 Ill. 176;

Kerfoot v. Hyman, 52 Ill. 512; Heardon v. Washburn, 59 Ill. App. 161; Linn v. Clark, 295 Ill. 22; Fox v. Simons, 251 Ill. 316; Tyler v. Sanborn, 128 Ill. 136; Glover v. Layton, 145 Ill. 92; Huiber v. Herren, 155 Ill. 242. This fact alone is sufficient to bar plaintiff from a recovery in this case.

A further complete answer to plaintiff's claim is that the evidence was conclusive that the parties never came to any agreement on many vital points of the lease. There was no definite arrangement with reference to the \$25,000 to be put up as a deposit. Something was said about whether this should be put up in cash, bonds, or personal mortgage, but which it should be was left open. There was no agreement as to who should hold the \$25,000 nor as to how it should be applied. There was no agreement with reference to the obligations of the parties in the event of fire, nor as to the insurance. Nothing was agreed upon as to who should rebuild in the event of fire, nor whether or not the rentals should be suspended during the rebuilding period. Nothing was said as to what should be the effect of a default in payment of rent. There seems to have been a discussion with reference to remodeling the second and third floors of an old building on the premises in order to connect it with the proposed new building, but nothing was determined as to who should pay for the remodeling and neither was it agreed how it should be connected nor how much money was to be spent in remodeling. Nothing was determined with reference to any forfeiture of the building in case of non-payment of the rent, neither was it agreed as to the kind of building to be erected. The nearest they arrived at this was that something was said to the effect that the building should be something that the neighborhood justified, but how many stories in height or whether stores or offices were to be contained therein was left open. Nothing was said as to when this building should be erected.

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It is apparent that the minds of the parties never met in any complete, definite arrangement, but only as to one or two items. The parties were simply negotiating for an agreement. Under such circumstances, it cannot be said that plaintiff procured parties ready, able and willing to execute a lease with defendant upon terms satisfactory to all parties. As was said in Stein v. McKinney, 313 Ill. 84, a sale or lease of real estate involves the adjustment of many matters in addition to fixing the price or rent. From the very nature of the case, the parties could not orally agree as to all of the terms of a ninety-nine year lease, and until such a document was drawn and received the approval of the owner and the prospective lessees, the deal was still open and pending. Our conclusion is supported by Barnes v. Ludington, 51 Ill. App. 90; Plinty v. Kinder, 194 Ill. App. 116; Mignault v. Gunther, 171 Ill. App. 311; Stein v. McKinney, 313 Ill. 84; Palmer v. Bokorny, 217 Mich. 284; Neenan v. Mott, 194 N. Y. S. 502; Voeds v. Matthews, 224 Mass. 577; C. & E.I. R. R. Co. v. Chipps, 226 Ill. 584; Reynolds v. Wetzler, 284 Ill. 607.

There were errors upon the trial which, in any event, would require a reversal. The court improperly would not permit the attorneys for defendant by cross-examination to develop, if possible, further particulars concerning the interest of plaintiff in the prospective lease. It was also improper, in passing upon an objection, for the court to refer to a "contract" between the Bernsteins and McNally, whereas it was the justifiable contention of the defendant that no contract existed.

It was also reversible error to give plaintiff's instruction 1, which in substance told the jury that if plaintiff procured for defendant a tenant who would sign a ninety-nine year lease which would net the defendant \$25,000 a year, plaintiff had earned his commission and was entitled to recover. This ignored all the material facts in controversy concerning the terms of the

proposed lease, and there was no evidence to justify predicated plaintiff's recovery upon securing an average rental of \$25,000 a year. A similar criticism might be made of plaintiff's instruction II, which included the factor of an average rental of \$25,000 a year, which is not in accordance with the evidence.

We are of the opinion, however, regardless of errors on the trial, that the plaintiff is not entitled to recover. Upon the uncontroverted fact with reference to plaintiff's financial interest in the prospective lease, he cannot recover a commission from the defendant for his services; and also he is barred from a recovery by the fact that the evidence demonstrates that the owner of the property and the proposed lessees never agreed as to the terms of the lease.

It was reversible error for the court to deny the motion of the defendant, at the conclusion of all the evidence, to instruct the jury to find the issues for the defendant.

We therefore shall reverse the judgment with a finding of facts without remanding the cause.

REVERSED WITH FINDING OF FACTS.

Matchett, P. J., and O'Connor, J., concur.

between them, and there was no possibility of a happy marriage.
 His father's death was a great blow to him, and he was
 left alone in the world. He was a very kind and generous
 man, and he was very much loved by his family and friends.
 He was a very good man, and he was a very good father.

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We find, as a fact, that plaintiff was interested financially in the proposed lease to the extent of a one-quarter interest therein, which fact was not disclosed to the defendant, and therefore plaintiff cannot recover for alleged services as an agent for his principal, the defendant.

We also find, as an ultimate fact, that the owner of the property and the prospective tenants never agreed upon the terms of a lease, and therefore the plaintiff did not procure parties ready, able and willing to agree upon the terms of a lease with the defendant.

JOHN GUNDERSON, a Minor,
Appellee,

vs.

AARON LEVIN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for personal injuries plaintiff had a verdict for \$5500, upon which judgment was entered. The defendant appeals.

The accident happened about 4:30 o'clock in the afternoon of September 3, 1924, on Armitage avenue, an east and west street in Chicago, about the center of the block between Francisco and Mozart streets. Plaintiff was then thirteen years of age. The automobile of the defendant concerned in the accident was a Buick driven by defendant's son, who was then seventeen years of age. Plaintiff was a newsboy and on the day of the accident had finished his work and saw a Ford coal truck driven by Raymond Herrer going west on Armitage avenue. He asked for a ride, permission was given and he took his place on the front seat beside Herrer. This truck had about a ton and a half of coal on it. It proceeded in the west-bound street car track at about eleven miles an hour. As he approached the center of the block between Francisco and Mozart, Herrer met an eastbound street car coming at the usual rate of speed. Following it in the street car track and going east was a large truck for garbage or building material with large flaring sides. This was so wide that as Herrer's truck passed it there was very little space between them, and it hid from view defendant's Buick, which was following, also going east. Defendant's son was on his way to a garage which was

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10. John H. Johnson, *Johnson's*, 1991, 8 pages, 10 copies to donors.

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- Bureau of Land Management, Department of the Interior, Washington, D.C.

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ed. The only one to see yesterday was a white male. He was not

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James' son, a healthy child, born on the 10th day of November, 1894, at 10

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and the authors are indebted to Dr. J. H. W. Lam for his critical reading of the manuscript.

JOSEPH J. ...

...and it is not a good idea to have a large number of small, uncoordinated efforts.

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on the north side of Armitage, about the middle of the block. When he was about opposite the garage he suddenly turned to the left, northward, in front of Harrer's truck. To avoid a collision Harrer quickly applied the brakes and turned to the left, missing the Buick by about four or five inches. This application of the brakes and the sudden turn to the left threw the plaintiff off the truck and before it could be stopped its rear right wheel passed over plaintiff's ankle, inflicting serious injuries.

There is some evidence tending to contradict plaintiff's witnesses with reference to the conduct of the driver of defendant's car, but the jury, considering the variant stories, could properly find that the defendant's car was turned suddenly without a warning of any kind into the pathway of the westward moving truck on which plaintiff was riding, thus compelling Harrer, the driver of that truck, in order to avoid a collision, to apply the brakes suddenly and turn to the left.

Defendant argues that even if defendant's driver was negligent, he did nothing more than furnish a condition by which the injuries were made possible, and that the proximate cause of plaintiff's injuries was the subsequent independent act of a third person, namely, Harrer, and hence defendant is not liable. Keith v. Commonwealth Electric Co., 241 Ill. 252, and many other cases. The applicable rule is that to impose liability the first negligent act need not be the sole cause nor the last or nearest cause, but it is sufficient if it concure with some other cause acting at the same time, which, in combination with it, produces the injury; or if the first act sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by an independent cause.

Here defendant's driver created a condition in which Harrer participated and whose action, in combination with the first action, caused the injury. Where an injury proceeds from

two causes operating together, the party putting in motion one of them is liable if it is an essential cause, even though it is not the last or nearest cause. Seith v. Commonwealth Electric Co., 241 Ill. 252; Waschow v. Kelly Coal Co., 245 Ill. 516; Fisher v. C. R. I. & P. Ry. Co., 290 Ill. 49; Sullivan v. Oehlhaber Co., 291 Ill. 359; Thomas v. Chicago Embossing Co., 307 Ill. 134; Kanter v. St. L. S. & P. R. R., 218 Ill. App. 565; Sweet v. Perkins, 196 N. Y. 482.

We also hold that the negligence of defendant's driver first set in motion a chain of circumstances of which Herrer's act was a logical and dependent sequence, hence defendant is liable for the resulting injuries.

The facts in the many cases cited by counsel for the defendant can be readily distinguished from those in the instant case. The verdict was consonant with the facts and the law.

Certain instructions given on behalf of the plaintiff are said to be erroneous, but as neither the abstract nor the record shows that the instructions there appearing were all the instructions given, this court cannot consider assignments of error relative to them. People v. Allegratti, 291 Ill. 364; People v. Goldberg, 302 Ill. 559. However, we find no prejudicial error in the instructions about which complaint is made.

In any event the jury could have properly returned no other verdict upon the facts before it, and under such circumstances slight errors in instructions will not justify a reversal. People v. Scimani, 316 Ill. 591.

There is no reasonable ground for reversal, and the judgment is affirmed.

AFFIRMED.

Katchett, R. J., and O'Connor, J., concur.

216 - 31827

ABBIE M. SHATTUCK,
Appellant,

vs.

OLIVER F. SHATTUCK,
Appellee.

)
APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.
)

MR. JUSTICE McDERMOTT DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill asking for a divorce from defendant. After the hearing the chancellor ordered the bill dismissed for want of equity, and she appeals.

Complainant charged as grounds for divorce habitual drunkenness and cruelty on the part of defendant, and the only point in argument is whether these charges were sufficiently proven. The chancellor held that they were not.

The parties were married September 10, 1913, and lived together until June 14, 1926, except for a time between February 14 and May 27, 1926, when complainant had left defendant and had filed a bill for divorce, but at defendant's earnest request the bill was dismissed and the couple again lived together until June 14, 1926, when complainant again left defendant. As a result of the marriage two children were born, a boy, Raymond, who was eleven years of age at the time of the hearing; and a daughter, Lydia, then seven years old. Defendant was a milk wagon driver. They had a home at 75th avenue and Irving Park boulevard for which defendant was paying in instalments and which was in the name of both parties in joint tenancy.

The testimony as to the alleged drunkenness and acts of cruelty is in irreconcilable conflict. Complainant testified that defendant had been drinking moonshine whiskey ever since Prohibition; that he purchased it from outsiders and also kept a still

in their home and manufactured the whiskey which he consumed; that for two years prior to the filing of the bill he had been drunk on the average of twice a week; that he drank moonshine whiskey the first thing in the morning; that he insisted that complainant assist him in disposing of moonshine whiskey and that she allow men to come to the house to purchase drinks; that when she refused he used abusive and profane language toward her and the children, and it was for this reason that she left him in February, 1926; that the defendant allowed their boy Raymond to have access to the whiskey and on one occasion the boy became dead drunk and gravely ill from the effects of drinking this whiskey.

On the charge of extreme and repeated cruelty complainant testified that February 1, 1924, defendant got into an argument with her about the paycheck and struck her a violent blow on the hip, from the effects of which she limped for several days; that again in March, 1925, defendant struck her on the arm, causing the loss of the use of her arm for three or four days, and she suffered greatly from pain and swelling and was obliged to take treatment from a nurse; that June 14, 1926, defendant threw her down on the bed, dug his fingers into her arm and shoulders and wrenched and twisted them so that there were black and blue marks; that the next morning she left the defendant and went to her sister's home in Oak Park. Two sisters of complainant gave evidence tending in part to corroborate complainant's story both as to defendant's drunkenness and the acts of cruelty.

In contradiction defendant testified that their family life had been pleasant and that they had never had any trouble except as caused by his wife's folks; that February 14th, when complainant left him, he was out of work; that she took her two children and went to her sister's home; that he did not know she intended to leave, but found her gone when he returned home;

that he telephoned to her and inquired as to the cause of her leaving, and she then advised him that she would no longer live with him; that some time prior to May, 1924, complainant had two serious operations for disease of the ovaries; that before these operations she had been "a little bit off" in her head; that in May, 1924, she grew "mentally worse" and she was finally taken by him to a physician's office, who advised that she be placed in a sanitarium overnight; that a neighboring woman was called in to assist the defendant, and after attempting in vain to place her in the asylum at Dunning, and then at Cook county hospital, she was placed in the Psychopathic hospital, where they put her in ice packs. Defendant called to see her the next day but on the advice of the doctor she was left there for three days. There were definite evidences of mental derangement and at a hearing before the County court she was adjudged insane and ordered sent to the Dunning asylum, but at defendant's request was sent to the Elgin asylum. She remained there about six weeks and defendant went to see her every three or four days, sometimes bringing the children. Defendant kept insisting that the doctor permit her to return home, and finally at his earnest request complainant was paroled to defendant in June, 1924. She was very weak and defendant procured a nurse to take care of her for a few weeks.

The court properly ruled that evidence as to the mental condition of complainant was relevant not only as touching upon the conduct of defendant towards his wife, but also as tending to assist the chancellor in arriving at a conclusion as to the credibility of her testimony.

Defendant testified that while he might take a drink of liquor occasionally when it was offered to him, he never spent any money for it and was never drunk in his life; that he never made liquor nor gave any to his son, except once in a while he gave the

boy a teaspoonful as medicine.

There were several witnesses who corroborated defendant's assertion that he was never drunk; among them a sistewin-law of complainant testified that she never knew of defendant being addicted to intoxicating liquor, that she never saw a still in their home, and that although she kept house for them, she had never seen any liquor or bottles there. Defendant's brother also testified that he never saw defendant drunk; also a neighbor, who had seen him almost every day for four years, testified that he had never seen him intoxicated; and another witness who worked with defendant for three and a half years, stated that he had never seen defendant drunk.

The son Raymond testified that his father was never drunk and that he never saw any liquor around the house. The boy also testified as to the occurrence when he was sick from drinking liquor, that a Mr. Clements, who lived across the street, gave him a bottle of beer and told him to take it over to his father and uncle who were plastering, but instead of doing this Raymond drank the contents of the bottle, which made him very sick. Complainant testified that defendant and his brother were frightened when the son was so sick.

Upon the question of cruelty, defendant testified ^{positively} that he never struck his wife nor abused or mistreated her. Neighbors who had been in the house frequently testified that they never saw any evidences of ill-treatment of complainant by defendant. Raymond, the son, testified not only that his father was never drunk, but that he had never seen him strike complainant nor heard her say at any time that the defendant had struck her; that he never saw him nor heard of him striking her on the hip, nor ever heard her complaining, and had never seen nor heard of him striking her on the arm.

The chancellor, who saw the witnesses, had the opportunity to note their demeanor and intelligence while testifying. We have not that opportunity. When the bare record before a reviewing court seems to be evenly divided as to weight, the better opportunity of the trial court to pass upon the credibility of the witnesses will control. In any event, we cannot disagree with his conclusions unless we are convinced that they are manifestly against the preponderance of the evidence. As was said in Dyag v. Dyag, 251 Ill. 367, 373:

"The chancellor, however, had the advantage of observing the witnesses as they testified in open court, and we are not able to say that his finding was against the preponderance of the evidence."

This rule must control in the instant case, and the decree is affirmed.

AFFIRMED.

Hatchett, P. J., and O'Connor, J., concur.

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FRANCES PIECHOWKA, a Minor, by
John Piechowka, her Father and
Next Friend,

Appellees,

vs.

JOHN ZIELINSKI and WALTER ZIELINSKI,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Frances Piechowka in April, 1924, when she was three and a half years of age, was struck by an automobile truck belonging to the defendant, John Zielinski, and driven by Walter Zielinski. Suit was brought to recover damages for the injuries she received and upon trial by the jury she had a verdict for \$3,000. From the judgment thereon defendants appeal, making only the point that the verdict is excessive.

The evidence tends to show that the automobile truck at the time it struck plaintiff was going at the rate of thirty-five miles an hour, knocking her to the pavement; that she was picked up in an unconscious condition, was taken to the hospital for treatment, where she remained four days, and was then brought home, where she was confined for two weeks. The physician who treated the child testified that she received a cut on the forehead about an inch and a half long, which was sutured and healed rapidly; that he examined her head with the x-ray and found a linear fracture of the skull. Plaintiff's mother testified that since the accident plaintiff has suffered from headaches and during the warm weather the sickness is more violent, occurring as often as ten times a month; that when plaintiff has these sick spells she is nervous.

Generally speaking, a court of review will not interfere with the amount of a verdict unless it is so excessive or so

grossly inadequate as to be indicative of prejudice, passion, partiality or corruption on the part of the jury, or unless it appears to have been based upon consideration of elements not within the scope of the action. Courts should merely consider whether the verdict is fair and reasonable and in the exercise of sound discretion under all the circumstances of the case, and it will be so presumed unless the verdict is so excessive or outrageous with reference to those circumstances as to demonstrate that the jury have acted against the rules of law or have suffered their passions, prejudices, or perverse disregard of justice to mislead them. 17 C. J. 1097. A reviewing court will not set aside a verdict simply because it would have given less. 38 Cyc. 1147. Pesch v. Chicago Ry. Co., 221 Ill. App. 241.

Tested by these rules we would not be justified in setting aside this verdict on the ground that it is excessive. There is no fixed rule for the computation of damages for personal injuries and the decided cases show a great variety of awards. If, in this particular case, the child received a fracture of the skull, as the evidence tends to show, the verdict of \$3,000 cannot be said to be excessive. Even if sitting as jurors we would have awarded a less amount, this alone is not sufficient to justify us in disturbing the verdict.

For these reasons the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

It is also true that the Government has been very successful in its efforts to suppress the sale of opium. The Government has been very successful in its efforts to suppress the sale of opium.

Wash. v. Collins, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 9

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1882

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E. B. JACOBS,
Appellee,

vs.

BLANCHE JETT,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff distrained on the furniture of defendant for rent alleged to be due, and had a verdict for \$545, upon which judgment was entered and from which defendant appeals.

Plaintiff is the owner of the premises Nos. 6116-6118 Kenwood avenue, Chicago. Defendant was a tenant of an apartment in No. 6118 at \$125 a month. She also occupied an apartment in No. 6116. The character of this occupancy is in dispute. Plaintiff testified that in May, 1926, a few days after they had agreed to the letting of the apartment in No. 6118 Kenwood avenue, he had a conversation with defendant with reference to the apartment at No. 6116. He testified that defendant asked him how much the rent would be for No. 6116 and he told her it had been rented at \$125, but he would let her have it for \$115 a month, and that if she moved her furniture in during May and rented any portion of the rooms at No. 6116, he was to receive the amount that came in as rental for May up to \$115, and over \$115 was to be defendant's; that after May, beginning the 1st of June, the rent was to be \$115 a month; that defendant said this would be satisfactory; that much repairing and decorating was done on No. 6116, as defendant was anxious to move in. The evidence tended to show that defendant rented out rooms of the apartment at No. 6118, but occupied No. 6116 as her own residence with her husband, who is a doctor and received professional calls over the telephone at this place.

3461A. 602+

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THINGS ARE BEING DONE AND OVERVIEW WILL BE AVAILABLE SOON.

Witness testified that the defendant was a tenant of an apartment in No. 618 at 4112 a month. He also occupied an apartment in No. 618. The character of this occupancy is in dispute. Witness testified that in May, 1936, a few days after they had entered the building of the apartment in No. 618 at 4112 a month, he had a conversation with defendant with reference to the apartment in No. 618. He testified that defendant asked him how much the rent would be for No. 618 and he told her it had been rented at \$125, but he would let her have it for \$115 a month, and that if she moved her furniture in during May and rented any portion of the rooms at No. 618, he was to receive the money that came in as rental for May up to \$115, and even \$115 was to be returned; that after May, beginning the 1st of June, the rent was to be \$115 a month; that defendant said this would be satisfactory; that when regarding and discussing was done on No. 618, no reference was made as to have in. The witness stated to him that defendant rented out rooms of the apartment at \$1.00, but occupied No. 618 as her own residence with her husband, who is a doctor and received professional calls over the telephone at this place.

Defendant's version is that she was to place her furniture in the apartment at No. 8116 for ninety days and "see what she could do; *** that he (plaintiff) did not want any money if it was not advantageous to her."

The jury accepted the plaintiff's story as the more reasonable. It is hardly probable that a landlord would give a tenant occupancy of an apartment to be used as a family residence with the understanding that no rent need be paid if the arrangement "was not advantageous" to the tenant.

As we understand the argument for the defendant, it is a reiteration of the claim that the verdict is contrary to the evidence. We cannot agree with this.

The tenancy and the amount of rent being established by the proof, and as the amount due and unpaid is not substantially controverted, plaintiff was legally entitled to distrain on the furniture. We see no reason to disagree with the verdict of the jury, and the judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

...in fact this was a plain fact
...in the amount of \$5.00 for the first time
...and could be; but this (plaintiff) did not want any
...money if it was not advantageous to her.
The jury accepted the plaintiff's story as the more
...it is fairly evident that a plaintiff would give a
...of an amount to be paid as a result of the
...with the understanding that no more would be paid in the future
...ment "was not advantageous" to the defendant.
...in the amount of the plaintiff's claim, it
is a refutation of the claim that the value is contrary to
the evidence. We cannot agree with this.
The second and the amount of the value established
by the jury, and as the amount was not substantially
contested, plaintiff was legally entitled to disburse on the
...of the value of the
...and the defendant is entitled to return.

...and the defendant is entitled to return.

CHARLES SWANBUM,
Appellee,
vs.
T. J. RIGNEY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Automobiles owned and driven by the respective parties collided, resulting in damage to the one owned by plaintiff. He brought suit to recover and upon trial by the court had judgment for \$133, from which defendant appeals. The only question involved is one of fact.

The collision occurred at the intersection of Lake street, which runs east and west, and Franklin street, which runs north and south. The accident happened on a bright morning in June. Plaintiff was driving his car easterly along Lake street. As he approached Franklin street he says he was going about eighteen miles an hour; that when he was a little east of the middle of the block, towards Franklin street, he looked to the north and saw defendant's car coming south on Franklin, then about a block away; that defendant's car was going between thirty and thirty-five miles an hour; the cars continued on their way, defendant's not stopping as it came into Lake street. It attempted to cross in front of plaintiff's car and almost succeeded, but plaintiff's car hit defendant's rear wheel, inflicting the damages in question on plaintiff's car.

This testimony is contradicted in some particulars by the defendant and his daughter, who was riding with him, but as the trial court had the opportunity of seeing the witnesses while testifying we cannot say that its conclusion as to the facts is manifestly against the weight of the evidence.

We have, then, the situation of plaintiff's car approaching Franklin street from the west, going about eighteen miles

3461A. 603

RECEIVED FROM BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE

CHARLES BRANNAN,
Appellee,
vs.
F. J. HICKS,
Appellant.

MR. JUSTICE BRANNAN DELIVERED THE OPINION OF THE COURT.

On appeal from the judgment of the District Court of the District of Columbia.

Parties called, resulting in damage to the one owned by plaintiff. He brought suit to recover and was tried by the court and judgment for \$100, from which defendant appeals. The only question involved is one of fact.

The collision occurred at the intersection of Lake Street, which runs east and west, and Franklin Street, which runs north and south. The accident happened at a bright morning in June. Plaintiff was driving his car easterly along Lake Street.

As he approached Franklin Street he says he was going about eighteen miles an hour; that when he was a little east of the middle of the block, towards Franklin Street, he looked to the north and saw defendant's car coming north on Franklin, then about a block away; that defendant's car was going between thirty and thirty-five miles an hour; the cars continued on their way, defendant's car stopping as it came into street. It stopped to stop in front of plaintiff's car and almost immediately plaintiff's car hit defendant's rear wheel, inflicting the damage in question on plaintiff's car.

This testimony is contradicted in some particulars by the testimony of his daughter, who was riding with him, but on the trial court had the opportunity of seeing the witnesses while testifying we cannot say that the testimony as to the facts is manifestly against the weight of the evidence. We have, then, the question of plaintiff's car approaching Franklin Street from the west, going about eighteen miles

an hour, and when it is past the middle of the block towards Franklin, defendant's car is coming from the north about a block away, going about thirty miles an hour. It is self-evident that if both cars continue without change of speed or direction, they will collide at the intersection. Section 33 of the Motor Vehicle act, chapter 95a, Illinois Statutes, provides that "motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left." This is a case for the application of this rule. Plaintiff was entitled to the right of way, and it was negligent conduct on the part of the defendant, causing the accident, not to yield.

The judgment is proper and is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

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GARNETTE ARRICK,
Appellee,

vs.

CHICAGO UNITED THEATRES, Inc.,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries claimed to have been sustained by her. There was a verdict and a judgment in her favor for \$15,500, and the defendant appeals.

The record discloses that in October, 1921, plaintiff, a woman twenty-nine years of age, was employed as a member of a troop to play a harp at defendant's theater, which was located at No. 715 West 63rd street, Chicago. She had been engaged in this occupation for some time prior to October, 1921, playing the harp in a number of theaters and at Chautauqua. The evidence shows that one Woolfolk was the owner of a production called the "All Girl Revue." There were nine girls and a manager who took part in the production. In October, 1921, Woolfolk entered into a contract with the defendant to produce his production at the defendant's theater on the afternoons and evenings of October 20, 21 and 22, 1921. There was to be a rehearsal on the forenoon of October 20th. Plaintiff offered evidence to the effect that the rehearsal was to commence at 10:00 A. M., while the defendant's position was, and its evidence tended to show, that the rehearsal was to begin at 11:00 A. M. The evidence further shows that on the forenoon of October 20th plaintiff, by appointment, met William E. Nelson, who was the manager of the company, and went with him to the defendant's theatre, arriving there about 9:30 o'clock, to take part in

STATE OF OHIO
COUNTY OF COLUMBIA

ALLEGEDLY
VS.
ALLEGEDLY
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MR. JUSTICE DELIVERED THE VERDICT ON THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries claimed to have been sustained by her. There was a verdict and a judgment in her favor for \$10,000, and the defendant appeals.

The record discloses that in October, 1931, Plaintiff, a woman twenty-nine years of age, was employed as a member of a group to play a party at defendant's home, which was located at No. 718 West 43rd Street, Chicago. She had been engaged in this occupation for some time prior to October, 1931, during the party in a number of houses and on the premises. The evidence shows that one Weillish was the owner of a residence called the "All Star House". There were nine girls and a manager who took part in the production. In October, 1931, Weillish entered into a contract with the defendant to produce his production at the defendant's house on the evenings and evenings of October 20, 21 and 22, 1931. There was to be a rehearsal on the morning of October 20th. Plaintiff offered evidence to the effect that the rehearsal was in progress at 12:00 A. M., while the defendant's position was, and its evidence failed to show, that the rehearsal was in progress at 12:00 A. M. The evidence further shows that on the morning of October 20th Plaintiff, by appointment, met William E. Nelson, who was the manager of the company, and went with him to the defendant's house, arriving there about 8:30 o'clock, to take part in

the rehearsal. Plaintiff testified that when they got to the theater they went to the stage entrance, which was on the east side near the rear of the building (the building faced north on 63rd street); that they found the stage door locked; that Nelson then went around to the front of the theater, she standing near the door; that shortly thereafter Nelson opened the stage door from the inside and they both went into the auditorium of the theater, walked west across the auditorium and under the stage into the musicians' room, which was west of the stage - the stage faced north; that they then walked up a stairway which led onto the west side of the stage where a piano stood; that as she went to pass around to the south behind the piano and between the south wall of the building, her right foot went down into a hole in the stage floor and she was injured, the humerus in her right arm being fractured. The evidence further shows that when plaintiff and Nelson arrived at the theater no one was at the theater except a colored janitor and his assistant, who were cleaning the vestibule at the 63rd street entrance. None of the other members of the troop had arrived for rehearsal, nor were any of the musicians, who were employed by the theater, there at that time, although they also were to take part in the rehearsal. There was no artificial light in the theater. It was semi-dark or dimly lighted, as some of the witnesses testified. Plaintiff further testified that she went upon the stage to procure her harp and to tune it; that it had not been used for a couple of days, as it had been packed and sent to the theater, and that it would take from thirty minutes to an hour to tune it, depending upon how many strings were broken. Neither the plaintiff nor Nelson had been in defendant's theater before the time in question. Nelson, who went to the theater with plaintiff, called by her as a witness, testified, by deposition, that he and plaintiff arrived at the theater about 9:30 o'clock in the

the restaurant. Plaintiff testified that when they got to the
restaurant they got to the front entrance, which was on the west side
near the rear of the building (the building faced north on that
street); that they found the stage door locked; that Nelson then
went around to the front of the theater, and standing near the
door; that shortly thereafter Nelson opened the stage door from
the inside and they both went into the auditorium of the theater.
Plaintiff went across the auditorium and under the stage into the
restrooms' room, which was west of the stage - the stage facing
north; that they then walked up a stairway which led onto the west
side of the stage where a piano stood; that as they went to the
piano to the south behind the piano and between the south wall of
the building, they slipped foot went down into a hole in the stage
floor and was injured, his shoulder in fact being broken.
Plaintiff testified that when they were walking and
Nelson arrived at the theater he saw one of the theater company's
colored janitor and his assistant, who were cleaning the vestibule
at the first street entrance. One of the white janitors of the
group had arrived for work, and saw one of the musicians, who
were employed by the theater, there at that time, although they did
not go to work in the restaurant. There was no artificial light
in the theater. It was dark and very dimly lighted, as one of the
witnesses testified. Plaintiff testified that when they went
upon the stage to search for the piano they saw a man sitting at
the piano for a couple of days, as it had been broken and was
the theater, and that it would not have been lighted in the
it was not, depending upon how many musicians were present. Plaintiff
the plaintiff saw Nelson and him in defendant's theater before
the time he was arrested, and that he saw him shortly after he
was released by him as a witness, testified by deposition, that he
and plaintiff walked to the theater about 7:30 o'clock in the

morning; that he had never been in the theater before; that there was a rehearsal called at ten o'clock; that they first went to the stage entrance, which was located on the east side near the rear of the building, and found the door there locked; that he then went around to the front of the theater, met the janitor who was cleaning up the lobby; that plaintiff and himself then went in the front door on the right side of the auditorium, leading to the musicians' room, and that he was told by the janitor how to proceed to the stage. The janitor, called by the defendant, testified that he admitted plaintiff and Nelson into the foyer, but told them that they could not go back to the stage at that time but that they would have to wait until other persons came who had charge of the matter.

In the view we take of the case it will be unnecessary to analyze the evidence except the testimony given by the plaintiff and by Nelson in her behalf, because it is most favorable to plaintiff's version of the matter. We do this because we are of the opinion that the court should have directed the jury to find for the defendant as requested by it at the close of the evidence, for the reason that plaintiff was guilty of contributory negligence as a matter of law.

There is a great deal of testimony in the record as to whether the rehearsal was called for ten or eleven o'clock, and this question is argued at considerable length by counsel in their briefs; but we are of the opinion that the question is not of serious moment and we shall assume in this opinion that the rehearsal was set for ten o'clock.

Plaintiff testified that she and Nelson walked across the auditorium toward the musicians' room, that it was "semi-dark, dimly lighted. We could distinguish objects there in the theater, *****I could see the seats;" that she went up the stairs; she intended to cross the stage to see if her harp was there; that

she went first and Nelson followed her; that the stage was not set; that she saw a lot of furniture and perhaps a piano on the stage; that she could not tell the dimensions of the stage, but that all she could see of it was covered by furniture except one space near the back or south wall of the theater; that "the stage was dimly lighted;" that the piano was about three feet from the edge of the stage; that she started around the rear of the piano in the open; that she looked where she was going and her right foot went down in a hole in the floor which was between the piano and the wall; that she saw no one but Nelson and herself in the theater. On cross-examination she testified that the auditorium was "dimly lighted; I could make out seats where the audience sits;" that they went down in the musicians' stall where they play; "it was just half light;" that they went into the musicians' room, which was off the west end of the stage; that that room was lighted, "I think there was a light from the outside window;" that they then went up the stairs onto the stage; that she did not remember seeing any artificial light on the stairway; she could just see the steps; that when she got on the stage "it wasn't dark, it was just dimly lighted; I don't know whether it was artificially or naturally lighted;" that she could see "furniture piled around there;" that "you could not have seen to read, or anything like that;" that whether you could see an object four feet away from you ^{would} depend on the color or outline of the object; that if a person were four feet away she believed that she could tell whether it was a man or woman; that she could tell a table from a chair four feet away; that there were chairs and tables piled on the stage; that it was in disorder and not ready for any performance; that she did not remember telling Nelson at the time that "it was awful dark in here;" that she did not bump into the piano, but might have touched it. Plaintiff further testified upon being shown a written statement signed by her, dated March 8, 1922, that

she believed she did then make a statement that she "didn't know just how she was injured, as it was practically dark on the stage."

Nelson testified that there were no artificial lights in the theater so far as the back of the stage was concerned; that when plaintiff and himself got on the stage they came in contact with the piano which took up practically the whole side of the stage; that he noticed a roll of carpet lying on the floor between the piano and the wall of the building; that as plaintiff stepped over into this her foot went down; that there was absolutely no light so far as the stage was concerned; that "it was dark;" that there was a small frosted wire glass window in the back wall about six or seven feet up on the back wall. On cross-examination he testified that when they first got on the stage plaintiff came in contact with the piano and then he "bumped into it. It was not absolutely pitch dark on the top of the piano ***** You would not call the stairway a bit light;" that there was daylight shining through the windows of the musicians' room; that he knew it was the musicians' room because there was a musicians' library there; that you could see the floor where you walked behind the piano in the corner; that "I mentioned the fact, 'Gee, it seems dark in here and there is no light on;' we both said that to each other;" that "the lobby of the theater was not lighted up;" that "there was just a small amount of daylight coming in;" that there was no artificial light anywhere in the theater what he could recall; that "it was not pitch dark. It was quite dark so that you had to feel your way along back of the piano.***** I could not see whether she was feeling with her feet."

The foregoing is substantially all the evidence in the record as to the condition of the theater at the time in question, and it is undisputed. The plaintiff was an experienced, educated woman twenty-nine years of age. She had been playing the harp at

the fellow who had been making a statement that the "thing" was
that he was injured, as it was practically dark on the stage.

He then testified that there were no artificial lights

in the theater as far as the back of the stage was concerned; that

when standing and standing on the stage that was in contact

with the piano which took up practically the whole side of the
stage; that he noticed a roll of canvas lying on the floor between

the piano and the wall of the building; that he plainly stepped

over from this bar that was there; that there was absolutely no

light as far as the stage was concerned; that "it was dark"; that

there was a small light on the piano which was in the back wall, about

six or seven feet up on the back wall. On cross-examination he

testified that when they first got on the stage visibility came in

contact with the piano and then he "knew" it. It was not

absolutely dark on the top of the piano because he would

not see the doorway a bit light; that there was daylight shining

through the doorway of the building; that he knew it was the

musicians' room because there was a window; likewise, that

he could see the piano when he walked behind the piano in the

corner; that "I mentioned the fact, 'there, it seems dark in here

and there is no light on'; we both said that to each other"; that

"the top of the piano was not lit up"; that "there was just

a small amount of daylight coming in"; that there was no artificial

light anywhere in the theater and he could see it; that "it was

not dark at all. It was quite dark so that you had to feel your way

along back of the piano. I could not see whether she was

feeling with her feet."

The foregoing is substantially all the evidence in the

record as to the position of the theater at the time in question,

and it is understood. The witness was an experienced, educated

man, intelligent, and of good character. He had been playing the piano at

theaters for a considerable period of time before the day of the unfortunate accident. She knew that the theater was not in order for the rehearsal, but on the contrary, her testimony shows that she knew it was in a state of disorder. None of her company had arrived. None of the employees of the theater, who were to put it in order, were there. No member of the orchestra had arrived. The theater was not lighted but was dark, and there was no one there at the time to turn on any lights. She had never been in that theater before. Just how she could have replaced any strings that might have been broken on her harp in the dark does not appear. Notwithstanding this knowledge and notwithstanding the darkness she continued groping her way along. We are of the opinion that all reasonable minds would reach the conclusion that she was guilty of negligence, and therefore the motion to direct a verdict for the defendant at the close of all the evidence should have been granted. As a general proposition the question of contributory negligence is one of fact for the jury and becomes one of law only when the evidence clearly establishes that the accident resulted from the negligence of the injured party. If there is any difference of opinion on the question, so that reasonable minds might not arrive at the same conclusion, then it is a question of fact for the jury. Bale v. Chicago, 259 Ill. 476; Chicago Union Traction Co. v. Jacobson, 217 Ill. 404; Kelly v. Chicago City Ry. Co., 283 Ill. 640; Louthan v. Chicago City Ry. Co., 198 Ill. App. 329.

Counsel for plaintiff in support of their contention that plaintiff was not guilty of contributory negligence as a matter of law, cited cases of Pauckner v. Waken, 231 Ill. 276, and Devine v. Nat. Safe Deposit Co., 240 Ill. 369. We think neither of these is in point. In the Pauckner case the evidence showed that Pauckner was in the employ of a company that had machinery stored in the defendant's warehouse and he was sent there to get it.

The man in charge of the warehouse took the plaintiff down an aisle and showed him where the goods were that he desired to remove. At this place plaintiff desired to go to the urinal and his request was granted. He proceeded through a narrow passage-way between the piles of coffee bags. Plaintiff was unacquainted with the room but saw a man with a lantern in the passage-way and started towards him to inquire where the urinal was located and in doing so fell into an unprotected shaft and was severely injured. The elevator shaft was very dimly lighted and the entrance to it was not guarded, and it was held that whether he was guilty of contributory negligence was a question of fact for the jury. In that case plaintiff was performing his work in the customary way. Employees of the defendant were there showing him about and pointing out the goods which he came for, so it is obvious that the facts are entirely dissimilar to the facts in the instant case. In the Devine case an employe while conveying goods to the tenant was fatally injured by falling down an unguarded elevator shaft. In that case the defendant was the owner of the First National Bank Building in Chicago, which was occupied by a large number of tenants. At the rear of the building on the first floor there was a door about nine feet in width. Inside this door a corridor led to a freight elevator for carrying goods to the different floors. There was a platform in the alley outside of the door for the use of the tenants. There was an opening of the elevator shaft in this platform, which was guarded by a rail. The deceased and another were unloading a cabinet on the platform. The elevator shaft was not properly guarded and the employe was fatally injured by falling into the shaft. It was held, under all the circumstances, that whether the deceased was in the exercise of due care was a question of fact for the jury. We think it apparent that the facts in that case are not at all similar to the facts in the case before us.

A motion for a directed verdict having been made at the close of all the evidence, and as we hold that the evidence viewed most favorably for the plaintiff discloses that she was guilty of contributory negligence as a matter of law, the judgment of the Circuit court of Cook County must be reversed with a finding of fact. Mirich v. Forachner Contracting Co., 312 Ill. 343.

REVERSED WITH A FINDING OF FACT.

Matchett, P. J., and McSurely, J., concur.

FINDING OF FACT.

We find as a fact that plaintiff was guilty of contributory negligence as a matter of law.

A motion for a directed verdict having been made at the close of all the evidence, and as we hold that the evidence viewed most favorably for the plaintiff discloses that she was guilty of contributory negligence as a matter of law, the judgment of the Circuit court of Cook County must be reversed with a finding of fact.

WILLIAM F. HENDERSON, Plaintiff,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Reversed with a finding of fact.
It is found as a fact that plaintiff was guilty of contributory negligence as a matter of law.

ESTHER W. SOUTHGATE, Executrix
under the Last Will of Charles
F. Southgate, Deceased,
Appellee,

vs.

JACOB EDSON HIMES,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On October 23, 1923, Charles F. Southgate of Ohio filed his bill of complaint against Jacob Edson Himes, personally and as executor of the last will and testament of Ella E. Southgate Himes, deceased, and others. While the case was pending Charles F. Southgate, the complainant, died, his death was suggested of record and his executrix was substituted as complainant. The suit was dismissed as to all of the defendants except Jacob Edson Himes. The case was heard before the chancellor and a decree entered whereby the defendant Jacob Edson Himes was decreed to pay to the complainant within thirty days \$13,638.32, and he appeals.

The facts are: that on July 19, 1909, Richard H. Southgate of Chicago made his last will and testament, whereby he devised and bequeathed all of his property to his wife, Ella E. Southgate "upon this condition and I make this a charge upon all of my property that my wife pay to my brother, Charles F. Southgate *****the sum of \$6,000.00 to be paid to him each and every year so long as he shall live." The wife and another were appointed executors of the will without bond. At the time of the execution of the will Richard H. Southgate was worth about a million dollars, consisting of real estate, stocks and bonds. He owned about 1200 shares of the capital stock of the Congress Hotel Company. He died March 3, 1912, leaving him surviving as his only heirs at law and next of kin, his widow, Ella E. Southgate, and his brother, the

WILLIAM HENRY HARRIS
OF NEW YORK

WILLIAM HENRY HARRIS, deceased,
under the last will of William
H. Harris, deceased,
Testator,
vs.
WILLIAM HENRY HARRIS,
Executor.

THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK

ON October 20, 1920, Charles F. Thompson at New York

filed his bill of complaint against Jacob Harris, personally
and as executor of the last will and testament of WILLIAM H. HARRIS,
deceased, testator, and others. To the bill was annexed a verified
complaint, the complaint, filed, his death was suggested of record
and his executor was substituted as respondent. The bill was dis-
missed as to all of the defendants named Jacob Harris, the
same was heard before the chancellor and a decree entered whereby
the defendant Jacob Harris was removed as executor of the last
will and testament of WILLIAM H. HARRIS, deceased.

The facts are: That on July 12, 1920, William H.

Harris at New York made his last will and testament, whereby he
bequeathed and bequeathed all of his property to his wife, WILLIAM H.
HARRIS, "upon this condition and I make a charge upon all
of my property that my wife pay to my executor, Charles F. Thompson,
the sum of \$10,000.00 to be paid to him cash and every
year so long as he shall live." The wife and another were appointed
executors of the will of WILLIAM H. HARRIS. At the time of the execution of
the will William H. Harris was worth about a million dollars,
consisting of real estate, stocks and bonds. He owned about 1000
shares of the capital stock of the Long Island Railroad Company. He died
March 2, 1917, leaving his surviving and his only heirs at law and
next of kin, his wife, WILLIAM H. HARRIS, and his executor, CHARLES F. THOMPSON.

complainant, Charles F. Southgate. On May 7, 1912, the widow filed her petition, praying that the will be admitted to probate and that letters testamentary issue to her. In this petition she set up that the deceased left personal property of the value of about \$25,000.00 and real estate of \$15,000.00. The will was admitted to probate and letters issued in accordance with the prayer of the petition. The person named in the will to act as co-executor with the widow refused to qualify, so that letters testamentary were issued to the widow alone. She proceeded to administrate the estate and on May 28, 1913, filed her inventory in the Probate court of Cook County, which was approved. The inventory showed that the deceased had no real estate in Illinois; that he had the following personal property: cash \$310.00; personal property, as shown by the bill of appraisement, \$750.00; 300 shares of stock of the North Butte Mining Company; two notes, one for \$375.00, one for \$1000.00, and four other notes aggregating \$12,875.60, which four notes were stated as worth \$5000.00. All of the notes were secured by some collateral, and the evidence shows that these notes aggregating \$6375.00 were collected by the executrix. The inventory scheduled other stocks, which were said to be worthless.

The evidence further shows that the deceased at the time of his death owned a piece of real estate located in Wisconsin known as "Eoltown," and which the widow sometime after the death of her husband offered for sale for \$10,000.00, and agreed to take back a purchase money mortgage for the entire amount. It further appears that the executrix each year paid the \$6000.00 to Charles F. Southgate as provided in the will, the first payment being April 22, 1912, and the last August 15, 1921. For the year 1922 she paid Charles F. Southgate \$5,000.00, \$5,000.00 on April 3rd and \$2,000.00 on October 11. The last check was enclosed

in a letter signed Ella M. Southgate by Jacob Edson Himes, the defendant, in which it was stated that some new arrangement would have to be made in regard to the payment of any further money to Charles F. Southgate, and that the payments that had been made were "purely personal, as there is no property left from Mr. Richard M. Southgate, except the property at Bobtown, Wis." The evidence further shows that Ella M. Southgate, the executrix, on July 18, 1918, was married to the defendant, Himes. She died testate April 26, 1923, and her will was admitted to probate in the Probate court of Cook county. All of her property, under the will, went to her husband, the defendant. He administered the estate and filed his inventory, which showed that his wife had left \$200.67 in a Chicago bank, a piece of real estate in New York State and the Bobtown property in Wisconsin, as well as some goods and chattels aggregating \$3887.00.

A witness for the defendant testified that in September or October, 1910, Richard M. Southgate gave all of his personal property including stocks, bonds and notes to his wife; the aggregate value of all of these was over \$800,000.00. The witness further testified that on September 16, 1911, Richard M. Southgate conveyed a piece of real estate in Chicago to his wife; that the deed was acknowledged and delivered on that date. It further appears that the deed was not recorded until April 5, 1912, which was about two months after the death of Richard M. Southgate, the grantor. This was explained by the testimony of the witness, who was the attorney for Mr. and Mrs. Southgate for many years, by the fact that at the time the deed was executed and delivered the grantor laughingly stated to his wife that she need not be in a hurry to record the deed, so that it would appear that he left her something when he died.

A witness for the complainant testified that on

in a letter signed with W. B. Boudreau by Joseph Nelson Wilson, the
defendant, in which it was stated that some new arrangement would
have to be made in regard to the payment of any further money to
Charles W. Boudreau, and that the payments that had been made
were "entirely gratuitous," and there is no property left from the
estate of Boudreau, except the property in Illinois, Wis.
The witness further stated that Mrs. W. Boudreau, the wife
of the defendant, died on April 13, 1901, and her will was admitted to
probate in the Probate Court of that county. All of her property,
under the will, went to her husband, the defendant. He adminis-
tered the estate and filed his inventory, which showed that his
wife had left \$10,000 in a business bank, a close of real estate in
New York State and the balance property in Wisconsin, as well as
some goods and chattels amounting to \$200.00.
A witness for the defendant testified that in October,
1901, Richard W. Boudreau gave all of his personal
property including stocks, bonds and notes to his wife; the agree-
ment value of all of these was over \$100,000.00. The witness
further testified that on September 11, 1901, Richard W. Boudreau
conveyed a piece of real estate in Chicago to his wife; that the
deed was acknowledged and delivered to her name. He further tes-
tified that the deed was not recorded until April 8, 1902, which
was about two months after the death of Richard W. Boudreau; the
executor. This was explained by the testimony of the witness, who
was the attorney for Mr. and Mrs. Boudreau for many years, by
the fact that at the time the deed was executed and delivered the
executor had already agreed to his wife that she should not be in a
hurry to record the deed, as there is some reason why it is left
unrecorded - that is all.
A witness for the defendant testified that on

December 15, 1910, he purchased from Richard M. Southgate his stock in the Congress Hotel for \$415,000.00; that \$100,000 of this was paid in cash and notes given for the balance, one due each year and covering a period of seven years; that the notes were given to Richard M. Southgate and that they were paid to him until he died, and afterwards the payments were made to Ella F. Southgate, the widow. That sometime after the death of Richard M. Southgate the old notes were taken up and new notes given payable to the widow and the time of payment was extended one year.

The case was called for trial on July 9, 1926, and the defendant, through his counsel, stated he was not ready for trial because of the absence of a material witness; however, it was agreed that the deposition of this witness be taken and it was accordingly done a day or two afterwards. The case was tried on the 13th and 14th of July, and at the close of the evidence the court rendered an oral opinion, which was in favor of the complainant, and he directed the preparation of a decree. The decree was presented to the chancellor on July 20th following, and counsel for the defendant then offered evidence tending to show that the \$100,000 paid to Richard Southgate December 15, 1910, was deposited to Mrs. Southgate's account in a Chicago bank; that on June 17, 1911, \$7875.00 was paid to Richard M. Southgate as semi-annual interest on the notes remaining due for the Congress stock, and that this was deposited in Richard M. Southgate's bank and was later checked out and deposited in Mrs. Southgate's bank; that there was a further payment of \$37,772.00 made in November, 1911, to Richard M. Southgate and that this was deposited in Mrs. Southgate's account. There was also offered a cancelled check showing the payment to Richard M. Southgate in June, 1911. The court refused to admit this evidence, stating that the case had been closed. Complaint is made of this ruling. We think if the evidence had been admitted it would have

been of no benefit to the defendant. It corroborated the testimony of the witness called for the complainant and who had purchased the Congress Hotel stock to the effect that he had made payments to Richard H. Southgate for this stock from the time of the purchase until the death of Richard H. Southgate. And the fact that some of this money was deposited in Mrs. Southgate's account, either on the date payments were made or shortly thereafter, would not in our opinion tend to show that the stock of the Congress Hotel Company did not belong to Richard H. Southgate on December 15, 1910.

The defendant contends that he was taken by surprise when the witness for the complainant testified that payments for the Congress Hotel stock had been made to Richard H. Southgate during his lifetime, because the bill alleged that payment of the stock had been made to Mrs. Southgate, and that this constitutes a variance. When this evidence was adduced the record fails to show that any objection was made on the grounds of a variance or that the defendant was taken by surprise. We think the variance is immaterial.

It is further contended that the \$6000.00 annuity paid Charles F. Southgate, beginning in 1912 and ending in 1922, was a mere gratuity on the part of Ella E. Southgate, but we think this is not borne out by the record. Ella E. Southgate received a large estate from her husband, nearly a million dollars, and after his death and the probate of his will she recognized her obligation under the will by paying yearly \$6000.00 to the deceased's brother. In fact in her final report and account, which was made by her under oath, she swears that she presents to the Probate court with her final report and account the receipt of Charles F. Southgate, "evidencing the receipt by said Charles F. Southgate of Six Thousand Dollars per annum since the death of said Richard H. Southgate, this being in full compliance with the provisions of said will." The receipt attached is dated December 31, 1918, and is as follows:

been at no point in the history. It is understood that the
of the various cases for the consideration and was not purchased the
Congressional stock in the stock of the stock of the
Richard A. Longworth for the stock of the stock of the
until the death of Richard A. Longworth. The fact that some
at this time was reported in the Longworth's account, which was
the case payments were made on January 1, 1950, would not be
own opinion that he was that the stock of the Longworth Hotel Company
did not belong to Richard A. Longworth on December 18, 1950.
The following account was given by the
that the account was not paid to Richard A. Longworth during
Longworth Hotel stock had been made to Richard A. Longworth during
his lifetime, however, the bill alleged that a part of the stock had
been made to Mrs. Longworth, and that this constituted a violation.
When this evidence was introduced the record failed to show that any
objection was made on the grounds of a violation of the stock of the
and was taken by surprise. We think the violation is immaterial.
It is further stated that the Longworth's were
Charles A. Longworth, deceased in 1933 and married in 1935, and a
more property of the stock of Richard A. Longworth, but no other case is
not paid for by the Longworth. The Longworth's received a large
against the Longworth, which is a matter of record, and which was
death and the transfer of his will and recommended for distribution under
the will by making property to the stock of the Longworth's business. In
fact in the Longworth's account, which was made by her father
cash, and which was the property of the Longworth's estate with her
first receipt and account the receipt of Richard A. Longworth.
*The following account was given by the Longworth's at the Longworth
which was made by the Longworth's at the Longworth's account, this
being in fact a violation with the property of the Longworth's.
Receipt attached is dated November 18, 1950, and is as follows:

"J. Edson Himes

Chicago, Illinois, Dec. 31, 1918.

To Whom Concerned:

This is to certify that I, Charles F. Southgate, of Morrow, Ohio, have received Six Thousand Dollars (\$6,000.00) per annum since the death of my brother, Richard M. Southgate, from his widow, Mrs. Ella E. Southgate Himes.

This document is executed and signed in triplicate.
C. F. Southgate.

Witness:

Esther W. Southgate
J. Edson Himes."

This document was witnessed by J. Edson Himes, and although it recites that the money was received from the widow of Richard M. Southgate it is clear that the executrix and Charles F. Southgate understood that the money came from the estate of Richard M. Southgate. The evidence shows that upon the probate of the will of Richard M. Southgate the widow acknowledged her obligation as a legatee of the estate of her late husband, and the first intimation we have to the contrary is disclosed by the letter written to Charles F. Southgate by the defendant and which we have above referred to. Although the widow of Richard M. Southgate had received from Richard M. Southgate and his estate about one million dollars covering a period from 1910 to about 1915, when the last of the notes received for the Congress Hotel stock were paid, and although there is no evidence that she had made any bad investments, yet we find in 1923, when her estate is probated, the inventory made by the defendant discloses little or no property in the estate. The one who undoubtedly had information on this subject was the defendant and he did not appear at the trial, although it was stated a number of times before the case was actually on hearing that he would be present in person in court.

Richard M. Southgate disposed of his entire estate by giving and bequeathing all of his property to his widow upon the express condition that she pay an annuity of \$6000.00 to his

Witness, Elizabeth, Dec. 11, 1918.

In this case:

This is to certify that I, Elizabeth, the wife of James Wilson, have received the sum of \$100.00 from the estate of my husband, James Wilson, and I have paid the same to the estate of my husband, James Wilson, and I have received the same from the estate of my husband, James Wilson.

Witness:

Elizabeth W. Wilson,
1. James Wilson.

This document was witnessed by J. James Wilson, and as shown it
testifies that the money was received from the estate of Elizabeth
Bourgeois. It is also shown that the money was received by Elizabeth
Bourgeois from the estate of Michael E. Bourgeois.
The evidence shows that upon the probate of the will of
Michael E. Bourgeois the widow acknowledged her obligation as a
legatee of the estate of her late husband, and the first indication
we have to the contrary is furnished by the letter written to
Charles W. Bourgeois by the defendant and which we have above re-
ferred to. Although the widow of Michael E. Bourgeois had received
from Michael E. Bourgeois and his estate about one million dollars
covering a period from 1910 to about 1918, when the first of the
notes received for the Burgess Hotel were paid, and although
there is no evidence that she had made any bad investments, yet we
find in 1917, when her estate is probated, the inventory made by
the defendant Bourgeois lists as no property in the estate. The
one who undoubtedly had information on this subject was the defend-
ant and he did not appear at the trial, although it was stated a
number of times before the case was argued on motion that he
would be present in person in court.

Elizabeth W. Bourgeois, deceased, in the estate of

giving and receiving all of his property to his wife upon the
express condition that she pay an annuity of \$100.00 to his

brother. She in turn disposed of her property to Jacob Edson Nimes, the defendant, and any property coming to him from the estate of Richard H. Southgate would be subject to the same condition. And under the facts in this case, he having failed to make any explanation as to what became of the property, we think the decree ought not be disturbed. Moreover, he acquired the Bobtown property in Wisconsin, worth \$10,000. Ella E. Southgate, the widow, acquired this property under the will, as well as the property shown in the inventory filed by her, and also more than \$300,000 paid for the Congress Hotel stock. In these circumstances, we think the decree was warranted by the evidence.

The defendant further contends that a court of equity has no jurisdiction because the defendant's claim should have been presented in the Probate court. We think this contention cannot be maintained. The estate of Richard H. Southgate was closed in the Probate court March 5, 1919. The \$6,000 legacy had been paid each year up to that time and for about two years thereafter, so that no claim could have been presented.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

[illegible]

Journal of Management Education 33(1)

Journal of Management Inquiry 21(1) 3-17

FRANK WAISMAN,
Appellee,

vs.

HARRY LONDON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant claiming \$11,625 was due him for procuring a contract to be entered into by one C. Deering and the defendant, whereby defendant and Deering agreed to exchange certain real estate.

Plaintiff in his statement of claim alleged that he was a real estate broker and was employed by the defendant to sell or exchange certain real estate owned by the defendant, for which plaintiff was to be paid a reasonable commission; that afterwards on April 21, 1924, he procured C. Deering, who "executed a valid and binding contract in writing" with plaintiff for the exchange of properties. The defendant filed an affidavit of merits wherein he set up that he was willing at all times to carry out the contract executed by him and Deering, but that the latter had refused so to do; that he had filed a suit in the Circuit court of Cook county against Deering, seeking specific performance of the contract; that that suit was still pending and that one of the defenses set up by Deering in the Circuit court suit was that the contract was not enforceable. During the trial plaintiff, by leave of court, filed an amended statement of claim wherein he claimed \$4,000 was due him for the services rendered, which were the same as those set up in the original statement of claim. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for \$4,000 and the defendant appeals.

A copy of the contract between the defendant and Deering is attached to and made a part of plaintiff's statement of claim. Since the trial of the case the Supreme Court has handed down an opinion in the specific performance case, London v. Deering, 325 Ill. 599. The court in its opinion there sets out, verbatim, the contract entered into between London and Deering, and the evidence shows that this is the identical contract which plaintiff makes a part of his statement of claim. The Supreme Court in the London case held that the contract showed on its face that it was but a preliminary contract to be followed within three days by a "regular real estate contract," which was never executed; that the contract was indefinite, uncertain and unenforceable. Since plaintiff in the instant case bottoms his claim on the allegation that he procured the defendant and Deering to enter into a binding and valid contract for the exchange of the property, and since the Supreme Court holds that the contract is unenforceable, no recovery can be had by plaintiff upon it, and therefore the judgment must be reversed.

Cases cited by counsel for plaintiff to the effect that a broker may be entitled to recover his commission although the contract entered into between his employer and another can not be specifically enforced, have no application to the facts in the case before us. Of course, a broker employed to obtain a purchaser, and for which the owner agrees to pay him a commission, is entitled to his commission when he has produced a purchaser who is ready, able and willing to buy upon the terms proposed, and this too, although the fact that the owner of the property and the proposed purchaser enter into a contract which is not enforceable. This can not affect the rights of the broker, because he is not a party to that contract. His contract is with his employer. Rushkewicz v. St. George, 226 Ill. App. 310. Such cases are inapt here where

A copy of the contract between the defendant and
plaintiff is attached to and made a part of plaintiff's complaint
of claim. Since the trial of the case the Supreme Court has
rendered down an opinion in the similar case, Smith v. Smith, 1911
V. 100, 228 Ill. 527. The court in its opinion there said
that, therefore, the contract entered into between plaintiff and
defendant, and the contract entered into with the defendant
which plaintiff makes a part of his complaint of claim. The
contract is the same as the contract entered into between
on the one hand and a partnership consisting of the defendant
within three days of a "regular year estate contract," which was
never executed; that the contract was illegal, voidable and
unenforceable. Since plaintiff is the plaintiff in the contract in
claim on the defendant, he procured the defendant and having
to enter into a binding and valid contract for the recovery of the
property, and since the Supreme Court said that the contract is
unenforceable, no recovery can be had by plaintiff upon it, and
therefore the judgment must be reversed.
It is also stated by counsel for plaintiff in the brief
that a notice may be entered in regard to the execution of the
the contract entered into between the plaintiff and the defendant
not be executed in the contract, have an application in the State in
the case before the court. Of course, a person who is a partner in
the contract, and the other who enters upon it for a consideration, is
entitled to the consideration when he has rendered a consideration and is
ready, able and willing to pay the same. The contract, and this has
although the fact that the contract is the property of the plaintiff
therefore, since the contract is a contract, it is not a party to
and is not the subject of the contract, because it is not a party to
this contract. The contract is with the plaintiff, Smith v. Smith,
Ill. 100, 228 Ill. 527. The contract is with the plaintiff and the

plaintiff bases his claim upon the contention that he has procured a person who had entered into a valid and enforceable contract with his employer.

Since there can be no recovery in the instant case there is no reason for remanding the cause, and the judgment of the Municipal court of Chicago will therefore be reversed.

REVERSED.

Matchett, P. J., and McSurely, J., concur.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-20-2001 BY 60322 UCBAW

There is no reason for thinking the above, and the following is the correct result of the above.

...and the ...

CHARLES P. HAMILTON,
Appellee.

vg.

HYDE PARK STATE BANK,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

J. R. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in trespass against the defendant to recover damages for false arrest and imprisonment and obtained a verdict and judgment in his favor for \$700.00 and the defendant appeals.

The record discloses that between 11:30 and 12:00 o'clock on July 23, 1924, plaintiff went to the defendant bank with a check for \$25.00, drawn by David A. Palmer on the bank, and presented it to one of defendant's paying tellers for the purpose of obtaining the money. The paying teller did not recognize the signature of the maker and refused to cash the check and plaintiff was taken into custody by another employee of the bank. Shortly thereafter he was taken to the Hyde Park police station where he was searched and then taken to another police station in the downtown district, where he was weighed, measured and his finger prints taken. Soon afterwards he was taken back to the Hyde Park police station and when it was found that a mistake had been made in placing him under arrest he was discharged.

Plaintiff testified that he was a waiter by occupation, and at the time in question was employed at Colosimo's restaurant; that he had been so employed for more than six years; that on July 23, 1924, he went to the defendant bank to cash a check for \$25 drawn by David M. Palmer on the defendant bank, and which Palmer had given him at Colosimo's

restaurant in payment of a bill he had incurred at that place; that when he presented the check to the paying teller at the bank, the latter, after examining the check, left his place and conferred with the bookkeeper and requested the plaintiff to wait a minute; that there were six or eight other people there to be served at the time; that the paying teller returned to his window and called McMullen, who was acting in the capacity of a police officer at the time, and said to McMullen "Take charge of this young man;" that McMullen told plaintiff he was a police officer of the bank, showed him his star and told him to come along. He took hold of his arm and took him back to a private room and then inquired of plaintiff how and where he had obtained the check. The plaintiff then told him the check was given to him at the restaurant; that McMullen then took him over to the Hyde Park police station and in doing so held plaintiff by the sleeve. Plaintiff told him that was unnecessary and that McMullen replied that he did not wish to have to shoot anybody; that after they got to the station McMullen had a detective search him, took all of his money and other articles and laid them on the desk, among them being a notice from a building and loan association, advising plaintiff that there was an installment due on a bungalow which he had purchased; that they then had plaintiff write his name, and said they thought it looked like the signature which was on the check. McMullen told the detective to take plaintiff down to Captain Evans of the Identification Bureau for investigation; that before this was done, plaintiff was locked up in the Hyde Park police station for about thirty minutes, and then he was taken down in a patrol wagon to the Identification Bureau; that he was also locked up at the Identification Bureau for about thirty minutes, and again taken back to the Hyde Park police station, where it was discovered that a mistake had been made in placing him under arrest, the check

restaurant in payment of a bill he had incurred at that place;
that was the purpose of the visit to the police station of the
bank, the latter, after examining the check, left the place and
conferred with the bookkeeper and requested the plaintiff to wait
a minute; that there were six or eight other people there to be
served at the time; that the paying teller returned to his window
and called Hamilton, who was waiting in the company of a police
officer at the time, and said to Hamilton "Take charge of this
young man;" that Hamilton told plaintiff he was a police officer
of the bank, showed him his star and held him to come along. He
took hold of his arm and took him back to a private room and then
inquired of plaintiff how and where he had obtained the check. The
plaintiff then told him the check was given to him at the restaurant;
that Hamilton then took him over to the State Bank police
station and in doing so held plaintiff by the sleeve. Plaintiff
told him that was unnecessary and that Hamilton replied that he
did not want to have any more trouble; that after that he to the
station Hamilton had a detective search him, took all of his money
and other articles and laid them on the desk, among them being a
notepad with a penknife and some stationery, explaining plaintiff
that there was an indictment due on a document which he had pur-
chased; that they then had plaintiff write his name, and said they
thought it better to have the money he took on the check. Hamilton
told the detective to take plaintiff down to Captain Brown
at the Police Station for investigation; that before this
was done, plaintiff was locked up in the State Bank police station
for about thirty minutes, and then he was taken down in a patrol
wagon to the Police Station; that he was also locked up
at the Police Station for about thirty minutes, and again
taken back to the State Bank police station, where it was discovered
that a mistake had been made in placing him under arrest, the check

was returned to him and he was released.

The paying teller, called on behalf of the defendant, testified that at the time in question plaintiff called at the defendant bank and presented the check to the witness; that the latter looked at it but did not recognize the signature; that he then took the check to the bookkeeper and they were unable to identify the signature; that he then took the check back to the window and asked the plaintiff if he knew who made out the check. The plaintiff replied that he did not know; that at that time McMullen happened to be going by "and I called him and asked him to help this man; that I could not recognize the signature on the check;" that McMullen and plaintiff then went away from the window and he did not hear all that took place between them, and that he refused to cash the check and returned it to plaintiff.

McMullen testified that he was employed as a floorman by the bank at the time in question; that the paying teller called his attention "to this young man who had a bad check passed on him;" that they could not recognize the signature; that the witness then took plaintiff over to his desk and told him that they ought to go over to the police station, that they might know more about the check there; that plaintiff said he knew Mr. Schubert of the Hyde Park police. The witness stated that Schubert would not be in until twelve o'clock, but that he would take him over and introduce him to officer Murphy; that they walked over to the station together; that he did not take hold of plaintiff; that at the time the police officer asked plaintiff how he got the check; that plaintiff replied that he got it at Colosimo's the night before; that "I merely introduced him" and that he gave no directions to the officers to arrest plaintiff; that during his employment with the bank he was never authorized to make arrests; that it was no part of his duties to make arrests; that at the

the witness to him and he was released.

The paying officer, called on behalf of the defendant, testified that at the time in question plaintiff called at the defendant's home and presented the check to the witness. Plaintiff looked at it but did not recognize the signature; that he then took the check to the postmaster and they were unable to identify the signature; that he then took the check back to the witness and asked the witness if he knew who made out the check. The plaintiff testified that he did not know; that at that time the witness happened to be going by "and I called him and asked him to help make out; that I would not recognize the signature on the check;" that plaintiff and plaintiff then went away from the witness and he did not hear all that took place between them, and that he returned to work the check and returned it to plaintiff.

Plaintiff testified that he was employed as a messenger by the bank at the time in question. That the paying officer called on him at his home and told him a check which plaintiff made out for the bank could not recognize the signature; that the witness then took plaintiff over to his bank and told him that they would go over to the police station, that they might have some other check there; that plaintiff said he was not employed at the bank. The witness stated that defendant would not be in until twelve o'clock, but that he would wait for him and introduce him to the police station; that they walked over to the station together; that he did not take him to the station; that at the time the paying officer called plaintiff was in the bank; that plaintiff testified that he did not recognize the signature before; that "I merely introduced him" and that he gave no directions to the officers to arrest plaintiff; that during his conversation with the bank he was never advised to make arrests; that it was no part of his duty to make arrests; that at the

time he was in plain clothes and had a retired policeman's badge inside his clothes. On cross examination he testified, "I had a star and a revolver," but that he was not a special officer connected with the police force of Chicago; that he did not say to Hamilton, as they were going to the police station that he would shoot him if he made a move.

Officer Murphy of the Hyde Park police station testified that he recalled that plaintiff and McMullen came over to the station and that Hamilton was looking for officer Schubert whom he said he knew; that Hamilton had a check which he said he got at Colosimo's restaurant for which he gave cash to a customer; that the manager of Colosimo's would not cash the check; that plaintiff's answer to questions were somewhat confused, "so I ordered him to be sent to the Bureau of Identification for investigation;" that plaintiff was then taken to the Bureau of Identification and afterwards brought back. The report showed that he had no record and thereupon he was ordered released; that McMullen told the witness that the bank had no depositor with a signature the same as that on the check; that McMullen did not search Hamilton but that the witness had him searched.

The defendant contends that the court erred in refusing to direct a verdict in its favor as requested, for the reason that even if it be conceded that plaintiff was arrested and imprisoned through the action of McMullen, the defendant would not be liable because such acts of McMullen were outside the scope of his employment. Numerous cases are cited on this proposition. It would serve no useful purpose to discuss or distinguish these cases because we are clearly of the opinion that the motion for a directed verdict was properly denied. Whether McMullen had implied authority to make arrests, viewed in the light most favorable to

the defendant, was, in our opinion, a question of fact for the jury. Marshall Field v. Kane, 99 Ill. App. 1; Vrchotka v. Roschild, 100 Ill. App. 268; Coolahan v. Marshall Field & Co., 159 Ill. App. 466. The evidence shows that McMullen was a retired police officer; that he had a star and carried a revolver and was performing the usual duties such officials perform in banks. He was called by the paying teller, who was suspicious that plaintiff was endeavoring to cash a worthless check, and told to take plaintiff into custody. This he did and was endeavoring to do what he thought would prevent plaintiff from defrauding the bank. He took the plaintiff to the police station, had him searched, locked in a cell, taken down town to the Identification Bureau where he was again locked up, weighed and measured and his finger prints taken. In these circumstances, we think it clear that the verdict of the jury in favor of the plaintiff is supported by the evidence. The jury were instructed, at the request of the defendant, that plaintiff could not recover unless they believed from a preponderance of the evidence that some employee or officer of the defendant falsely accused plaintiff of a crime and caused him to be taken against his will to the police station and imprisoned; that such officer was at the time acting in the line of his duty with a view of furthering defendant's business, and there was no probable cause for detaining plaintiff. The jury having found in favor of the plaintiff accepted plaintiff's version of the matter and, as stated, we think this version was borne out by the evidence. Certain it is that we cannot say that the finding of the jury is against the manifest weight of the evidence.

The defendant further contends that the court erred in refusing to permit the witness McMullen to testify that he was not authorized to make arrests. Questions which sought to adduce this information were put to the witness McMullen on cross examination

the defendant, was, in our opinion, a question of fact for the jury. People v. Jones, 30 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

by the defendant, he having been called as a witness for the plaintiff. The court's ruling was not erroneous because the question did not concern any matter brought out on direct examination of the witness. Later, however, when this witness was called for the defendant, upon objection the court refused to permit the witness to answer a question put to him as to whether he was directed by the defendant never to make arrests. We think this ruling was erroneous. While the question technically considered called for a conclusion, yet we think the court ought to have permitted the witness to answer, but we are also of the opinion that the error was not of serious moment. The witness had already testified that it was no part of his duty to make arrests, so we think the error was not prejudicial.

A further complaint is made that the court erred in instructing the jury on behalf of plaintiff and in modifying instructions submitted in its behalf. Complaint is made as to instructions 2 and 6, given at plaintiff's request. The contention being that by instruction 2 the jury were told that if the defendant had no probable cause to believe plaintiff guilty of a crime, then they might infer malice and that instruction 6 warranted the assessment of punitive damages if they found the accused guilty of malice. This contention goes only to the amount of damages and we are clearly of the opinion that in no view of the case can the damages be considered excessive as the defendant contends. A judgment of \$750 was held not to be excessive in the Coolman case, supra, which was an action for false arrest and imprisonment where the facts were not as serious as those involved in the instant case, although that case was decided in 1911. Complaint is made in regard to instruction 3 because it is said it tended to confuse and mislead the jury and that it also ignored the important element that the defendant would not be liable for the acts of McMullen unless they were

in the line of his employment. Instruction 3 told the jury that as a matter of law an unlawful arrest constituted a trespass upon the rights of the person arrested, and that those who aided or abetted in the unlawful arrest were guilty of trespass. We are unable to see how this instruction would be of any assistance to the jury in arriving at the proper decision, nor can we see how it would affect the defendant. The issues were simple. The jury were told in effect that the defendant could not be held liable unless McMullen was acting in the line of his duty. Complaint is made as to instruction 5, but this instruction could only affect the amount of the verdict, and what we have already said disposes of the matter. It is also contended that the court erred in failing to give two instructions designated to. 1 and 2 on behalf of the defendant. The substance of these instructions was embodied in defendant's given instruction No. 7. Instruction No. 3 was abstract in form and therefore it was not error to refuse it. Moreover, we think the jury would understand the phrase "probable cause" by the language used in instruction No. 2 given on behalf of the plaintiff.

Upon a consideration of the entire record, we are of the opinion that the evidence warranted the verdict of the jury. The issues were simple and we think the instructions of the court, while not quite accurate, yet sufficiently informed the jury as to the law of the case.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

in the line of his employment. Instruction 3 tells the jury that
as a matter of law an unlawful arrest constituted a trespass upon
the rights of the person arrested, and that those who aided or
abetted in the unlawful arrest were guilty of trespass. We are
unable to see how this instruction would be of any assistance to
the jury in arriving at the proper decision, nor can we see how it
would affect the defendant. The issues were simple. The jury were
told in effect that the defendant would not be held liable unless
Kewell was acting in the line of his duty. Counselor is made an
to Instruction 3, but this instruction could only affect the amount
of the verdict, and thus we have already said otherwise of the
error. It is also contended that the court erred in failing to
give two instructions designated No. 1 and 2 on behalf of the de-
fendant. The substance of these instructions was embodied in In-
struction 3. Counselor No. 1. Counselor No. 2 was rejected
in form and therefore it was not error to refuse to receive it. However, we
think the jury could understand the phrase "probable cause" by
the language used in Instruction No. 3 given on behalf of the

defendant.
When a consideration of the entire record, we are of
the opinion that the evidence warranted the verdict of the jury.
The issues were simple and we think the instructions of the court,
while not quite accurate, yet sufficiently informed the jury as to
the law of the case.

The judgment of the Superior Court of Cook County is

affirmed.

BY THE COURT.

Witness, J. J. and formerly, J. J. County.

H. B. WHELOCK,
Appellant,

vs.

EDWARD HINES AND SHANK COMPANY,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants to recover \$34,640, claimed to be due him for services rendered as an architect. At the close of all the evidence, on motion of the defendants, there was a directed verdict in favor of the defendants and plaintiff appeals.

The record discloses there was a prior trial of the case and that the verdict of the jury in favor of the plaintiff and against the defendants of \$34,640 was set aside and a new trial awarded, for the sole reason that the trial Judge was of the opinion that plaintiff had not proven his case by preponderance of the evidence.

The evidence tends to show that the defendants owned 320 acres of land known as "Speedway Park," near Maywood, and that George Shank, president of the defendant Shank Company, conceived the idea of constructing a hospital on the property and selling it to the United States Government. He took the matter up with defendant Hines, who told Shank to go ahead with the project. Afterwards Shank consulted with plaintiff, who was an architect, to see what could be done toward utilizing the grand stand of the Speedway race track which was on the premises, in the proposed construction of a fireproof hospital; plaintiff investigated the matter and made a sketch of a proposed four story structure of 2000 feet in length and 50 feet in width. The evidence further shows that plaintiff went to Washington with Shank and some representatives of Hines in an endeavor to induce the Government to buy

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ALICE MARY CROFT
OF BIRMINGHAM

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The record of the case was a letter from the
agent and that the matter of the fact of the identity and
against the defendant of 1914, but was not a new trial
question, the only reason that the trial judge was of the opinion
that plaintiff had not proven his case by preponderance of the evi-
dence.

The evidence tends to show that the defendant owned
the motor of 1914 known as "Speedway 1914", which was owned, and that
George Smith, president of the defendant Smith Company, connected
the fact of manufacturing a motor on the property and selling it
to the United States Government. He took the motor up with him
Edward Smith, who told them to go down with the property. Al-
though Smith was not a party to the transaction, he was a witness, so
the fact that he was present during the transaction of the
Speedway motor which was in the presence, in the proposed con-
struction of a "Speedway" motor; plaintiff investigated the
motor and was a motor of a proposed "Speedway" motor of
1914 (a "Speedway" and 1914 is with. The evidence in the
case that plaintiff went to Birmingham with Smith and was there
negotiated at Birmingham in an endeavor to induce the Government to buy

the land and hospital when constructed; that considerable negotiations took place and afterwards it was practically decided that the Government would purchase the property, but insisted that it employ its own architect. The evidence further shows that both Hines and Shank tried to continue plaintiff as architect of the hospital but without success. Afterwards the hospital was completed by the Government and the defendants conveyed the property to the Government for \$2,500,000. It further appears from the evidence that the defendant Hines paid plaintiff from time to time while he was performing the work sums aggregating \$2960; but defendants contend that this was simply paying plaintiff's expenses in going to and from Washington while the negotiations were pending between defendants and the Government. The evidence further tended to show that after the construction of the hospital was taken over by the Government and after plaintiff had rendered all of his services, he presented his bill to the Government for payment but that payment was refused, the Government denying liability.

Plaintiff's testimony was to the effect that he presented his bill to the Government at the suggestion of counsel for the defendant Hines. Plaintiff also offered evidence to the effect that he afterwards demanded payment for his services and that defendant Hines promised to pay him, but at the time stated he had not as yet received his money from the Government.

Plaintiff's contention was that he was employed by the defendants to do the work, no express agreement having been made as to the amount of compensation he was to receive; while on the other hand, the defendants' theory was that plaintiff did the work with the hope and expectation that if the Government accepted the proposition and constructed the hospital he would be employed by it as architect, and that the defendants agreed to do all they could in securing his employment by the Government.

The law is that where defendant moves for a directed verdict at the close of all the evidence, the evidence must be considered and viewed in the light most favorable to the plaintiff, and if there is any evidence in the record from which the jury could, without acting unreasonably in the eyes of the law, find in favor of the plaintiff, the motion should be denied and the case submitted to the jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206.

Considerable evidence was offered on behalf of the plaintiff as to what was said between plaintiff and George Shank, president of the defendant company, most of which was excluded as to the defendant Hines, on the theory that he was not present and could not be bound in such circumstances. We think the ruling was wrong. While the evidence shows that plaintiff had practically all his negotiations with George Shank, president of the defendant company, yet it also shows that Hines was jointly interested in the property; that his counsel, Mr. Newman and Mr. Bennett, conferred with plaintiff from time to time and knew what was being done. And after plaintiff's services were all rendered he testified that he took the matter up with Hines and requested payment and that Hines agreed to pay the bill but stated that he did not have the ready money and had not been paid by the Government for the property.

We have not detailed all of the evidence in the record for the reason we have reached the conclusion that there must be a new trial. We think the evidence offered by plaintiff should have been admitted as to both defendants.

Plaintiff complains that the court erred in permitting, over his objection, evidence tending to show that he and Edward D. Shank, a son of George Shank, president of the defendant company, were partners, and that the services for which plaintiff claims, if there was any liability, ran to the partnership of Wheelock and

The law is that where testimony is given by a witness
testified at the close of all the evidence, the witness must be
cross-examined and shown in the light of the testimony of the plaintiff,
and if there is any evidence in the record that the law is
wrong, it must be shown by the evidence of the law, that is
shown to the plaintiff, the witness must be shown and the case
submitted to the jury. *State v. Smith & Jones, 100 N. H.*

THE

Defendant's evidence was offered on behalf of the
plaintiff as to what was said between plaintiff and George Smith,
president of the defendant company, and of which was excluded on
the ground that, on the theory that he was not present and
could not be shown in such circumstances. We think the ruling was
wrong. While the evidence shows that plaintiff was, practically all
his negotiations with George Smith, president of the defendant com-
pany, yet it also shows that Smith was jointly interested in the
venture; that his counsel, W. E. Brown and W. E. Brown, counseled
him against this line of line and how was being done.
And after plaintiff's evidence was all received he testified that
he took the matter up with Smith and requested payment and that
Smith agreed to pay the bill but stated that he did not have the
ready money and had not been paid by the Government for the property.
We have not detailed all of the evidence in the record
but the record as here recited the conclusion that there was a
new trial. We think the evidence shown by plaintiff should have
been admitted on its own merits.

Plaintiff complains that the jury was in error in
over his objection, evidence tending to show that he and George E.
Smith, a son of George Smith, president of the defendant company,
were partners, and that the witness for the plaintiff stated
it shows the same liability, that is the partnership of Brown and

Shank and not to Wheelock alone, the objection being based upon the contention that such defense was not set up in the affidavits of merits filed by the defendants. We think this contention must be sustained. We are this day filing an opinion in the case of Cooper v. Anderson, No. 31846, in which we held that a defendant is limited in his defense to matter set up in his affidavit of merits, although he has pleas on file. We think neither of the affidavits of merits sufficiently raised the contention. The Shank Company in its amended affidavit of merits set up inter alia that plaintiff was an architect "associated with one Edward D. Shank, a son of the president of the defendant company; that plaintiff was desirous, together with Edward D. Shank, of obtaining a contract for architectural services in the erection of a hospital" on the property owned by the defendants, and that plaintiff, "together with his said partner and architectural associate, Edward D. Shank, applied" to the defendants and requested them to assist him in procuring the contract; that plaintiff volunteered to prepare sketches, plans and specifications; that the defendants were willing to assist them in procuring such contract, if possible; that the defendants did not employ plaintiff or his partner and associate to prepare any plans and specifications; that plaintiff did prepare plans and specifications and went with Hines and a representative of the Shank Company to Washington in the matter; that Hines advanced to plaintiff sufficient money to pay his expenses in connection with the trips to Washington; that the money had not been refunded by plaintiff; that thereafter the Shank Company employed Edward D. Shank to assist it in letting contracts at a salary of \$75 a week, and that the work performed by plaintiff was in an endeavor by him to secure a contract from the government as architect for the hospital. Hines in his affidavit of merits denied entering into a contract with plaintiff as claimed, and denies that he paid Wheelock

on account of his services \$2960, but alleges that this sum was loaned. We think these affidavits of merits did not sufficiently set up as a defense that plaintiff alone could not maintain an action because any liability of the defendants was to plaintiff and his associate or partner, Edward D. Shank; and we are therefore of the opinion that it was also improper for the court to admit evidence tending to show that plaintiff alone had no claim, but that if the defendants were indebted for the services claimed, it was to Wheelock and his associate or partner, Edward D. Shank.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and McCurely, J., concur.

The purpose of this document is to provide a summary of the information received from the various sources mentioned in the report. It is intended to be a concise and accurate statement of the facts as they are known at this time. The information is being presented in a clear and logical manner, so that it can be easily understood by those who are interested in the subject. The report is being prepared for the use of the Committee, and it is hoped that it will be of some assistance to them in their work.

VERY TRULY YOURS,

Enclosed, for the Committee, are the following documents:

116 - 31724

ANDREW DOLEJE,
Appellant,

vs.

ELATA KORUNA LOAN & BUILDING
ASSOCIATION, a Corporation, et al.,
Appellees.APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On September 26, 1925, Andrew Doleje filed his bill to redeem certain real estate from a foreclosure sale. After the issues were made up the cause was referred to a master, who made up his report and recommended that the bill be dismissed for want of equity. A decree was accordingly entered and the complainant appeals.

The record discloses that the complainant owned a piece of real estate in Chicago and on February 21, 1921, executed his mortgage on the property to secure payment of \$4800 which he had borrowed from the defendant, the Loan and Building Association. A few days later he further encumbered the property by a trust deed to secure the payment of \$2,000. On April 11, 1922, he conveyed the property by quit claim deed to George Rose, and the latter on December 12, 1922, executed a conveyance of the same to Mary Siwicki. On August 13, 1923, the Association filed its bill to foreclose the \$4500 mortgage. All parties were served either personally or by publication. A decree of foreclosure was entered on November 20, 1923, and in March, 1925, the property was sold under the decree to the Association. On March 17, 1925, the report of the sale was approved and a deficiency decree entered against Andrew Doleje for \$932.65. Afterwards the Association sold the property to Rudolph Kulac and his son. The Kulacs paid part of the purchase price in cash and executed a mortgage for the balance to the Association. The evidence shows that upon convey-

ance of the property to the Mulacs they proceeded to make improvements on it and had expended for this purpose \$4100.

Afterwards, on September 26, 1925, Andrew Dolejs filed the instant suit, claiming that he had not been served in the foreclosure proceeding and had not learned that there had been a foreclosure until a short time before he filed the bill. He also alleged in his bill that the sale of the property by the Association after the foreclosure to the Mulacs was not made in good faith. The evidence taken before the master overwhelmingly shows that the sheriff served the summons in the foreclosure suit personally on Andrew Dolejs and there is no evidence, nor was there any offered, tending to show that the sale to the Mulacs by the Association after the foreclosure was not made in good faith. The only evidence on this question was that offered by the Mulacs, which without contradiction shows that they purchased the property in good faith, paid their money for it and expended more than \$4,000 in putting it in a good state of repair. The master found that Dolejs had been served by the sheriff in the foreclosure proceeding, that the purchase made by the Mulacs was bona fide, and that they had no notice of any claim of any infirmity in the foreclosure proceeding. In fact no other finding would be warranted under the evidence in this case.

Dolejs testified that he was not served with the summons and that he knew nothing about the foreclosure proceeding until after the sale by the Association, under the foreclosure decree, to the Mulacs. He also offered evidence to the effect that on the day that the sheriff said he had served the summons, as shown by his return, he was in Michigan and therefore could not have been served. But the evidence on this point is not satisfactory

The deputy sheriff who served the summons testified that he had no personal recollection of the matter, but from his memoran-

some of the testimony in the Kallman case pertained to such matters as to the fact that Kallman was not in the room at the time of the murder.

On October 26, 1935, another witness filed the instant case, claiming that he had not been in the room at the time of the murder and that he had not seen a person who was with Kallman at the time of the murder. He also claimed that he was not in the room at the time of the murder. He also claimed that he was not in the room at the time of the murder.

The witness also claimed that he was not in the room at the time of the murder. He also claimed that he was not in the room at the time of the murder. He also claimed that he was not in the room at the time of the murder. He also claimed that he was not in the room at the time of the murder.

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dum on the back of the summons, which was in his own handwriting and which showed that the summons had been served personally, he knew that he had served it on Dolejs. The summons was therefore properly admitted in evidence. Koch v. Pearson, 219 Ill. App. 468.

The evidence further tends to show that after the foreclosure suit was instituted notices were served on Dolejs from time to time and that he talked with a number of witnesses and counsel in the case about the pendency of the foreclosure suit.

Where it is sought to overcome the return of process by a sheriff the proof must be clear and convincing. As said in the case of Marnik v. Cusack, 317 Ill. 362-364: "The stability of judicial proceedings, however, requires that the return of an officer made in the due course of his official duty and under the sanction of his official oath, should not be set aside merely upon the uncorroborated testimony of the person on whom the process has been served, but only upon clear and satisfactory evidence." In the instant case the evidence offered by the complainant to the effect that he had not been served in the foreclosure proceeding is far from clear and satisfactory. On the contrary, we think the evidence clearly shows that he was served by process. Moreover, the property having been sold after the foreclosure to the Mulacs, the sale having been made in good faith and without any notice or claimed defect in the foreclosure suit, the bill in the instant case would not lie. Rivard v. Gardner, 39 Ill. 125.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

Hatchett, F. J., and McSurely, J., concur.

THERESA HUNTER,
Appellee,

vs.

UNDERWRITERS MUTUAL LIFE INSURANCE
COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant in the Municipal court of Chicago to recover on a life insurance policy issued to her husband. The policy is dated June 27, 1924, and the record discloses that the assured died December 4, 1924, of organic heart disease. Prior to the issuance of the policy the assured was examined by a physician and he answered questions tending to show that his health was good.

A doctor testified on behalf of the defendant that in February and March, 1924, he treated the assured for organic heart disease and that he advised plaintiff, the assured's wife, of the nature of his ailment and that he might live a day or a month or a year. The evidence that the assured had organic heart disease and was about to die at any time and that he was treated by a physician during February and March, 1924, is uncontradicted. The evidence further shows that the assured died of organic heart disease in December following the issuance of the policy.

In this court plaintiff does not argue the merits of the case, and it is obvious that no such argument could reasonably be made. Complaint is made by the plaintiff to the nature of the abstract filed by the defendant, and we think there is considerable merit in this objection; but we are of the opinion that we would not be warranted in affirming the judgment on the ground of the insufficiency of the abstract. It shows substantially the facts as w

2-16-1907

WILLIAM HENRY HARRIS

BY DEED

CONFIRMATION OF THE DEED
GIVEN BY WILLIAM HENRY HARRIS
TO THE STATE OF NEW YORK

IN SENATE, JANUARY 10, 1907.

REPORT OF THE COMMISSIONER OF LAND OFFICES

The following report of the Commissioner of Land Offices is submitted to the Senate in accordance with the provisions of the act of the Legislature of 1892, chapter 480, section 1, which provides that the Commissioner of Land Offices shall submit to the Senate a report of the land offices for each year. The report is submitted in accordance with the provisions of the act of the Legislature of 1892, chapter 480, section 1, which provides that the Commissioner of Land Offices shall submit to the Senate a report of the land offices for each year. The report is submitted in accordance with the provisions of the act of the Legislature of 1892, chapter 480, section 1, which provides that the Commissioner of Land Offices shall submit to the Senate a report of the land offices for each year.

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have above stated. The finding of the jury is clearly contrary to the evidence, but since there was a jury trial we must remand the cause.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

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In the Matter of the Estate
of MARGARET ROBERSON, Deceased.)

Appeal of EMILY MORRIS,
Appellant.)

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Margaret Roberson died testate and her will was admitted to probate in the Probate court of Cook county, Illinois. All of her estate has been distributed in accordance with the orders of the Probate court except \$11,487.91, which is made up of two items, one for \$5,000 and the other for \$6,487.91. The Probate court held that both items should be distributed as intestate property to the heirs of the testatrix. On appeal to the Circuit court it was held that the item of \$5,000 did not pass as intestate property, but should be distributed to the heirs of Florence Rohrer, a legatee mentioned in the will. It was ordered that the other item should be distributed as held by the Probate court as intestate property to the heirs of the testatrix.

The questions to be decided depend upon a construction of the will of Margaret Roberson, deceased. By the fourth paragraph of the will the testatrix gave to her niece, Florence Rohrer, a specific legacy of \$5,000 (this is the first item above mentioned) and by the fifth paragraph she gave to her niece, Emily Morris, a specific legacy of \$6,000. By the sixth paragraph she made several specific money bequests in favor of certain of her relatives and friends aggregating \$15,000. The seventh and eighth paragraphs of the will are as follows:

"Seventh. In case at the time of my death there shall not be sufficient property to pay the money bequests above set forth, then it is my will and desire that each of the said money bequests be reduced proportionately. In case of the death of any of my above devisees, except my nieces, Florence Rohrer and Emily Morris prior to my death, then such devisees shall lapse to my estate.

"Eighth. All the rest and residue of my estate of which I

may be seized or possessed, after the payment of the above specific devises, I will, devise and bequeath to my beloved nieces, Florence Rohrer and Emily Morris, and their heirs and assigns forever."

The facts were stipulated and it appears that Florence Rohrer, mentioned in paragraphs four and eight of the will was one and the same person, and that she died before Margaret Roberson, the testatrix.

The heirs of Florence Rohrer contend that neither the \$5,000 legacy mentioned in paragraph ^{four} of the will, nor the one-half of the residuary estate mentioned in paragraph eight of the will lapsed but passed to them. Emily Morris contends that on the death of Florence Rohrer the \$5,000 legacy lapsed and became a part of the residuary estate, and that she, Emily Morris, being the sole surviving residuary legatee, is entitled to both sums which are in controversy in this case. The heirs of the testatrix contend that on account of the death of Florence Rohrer before that of the testatrix, the legacies given to Florence Rohrer passed as intestate property to them.

The fundamental rule is, that in construing a will the intention of the testator as gathered from the entire will is controlling. The general rule of law, unless modified by statute, is that a legacy or a devise will lapse where the legatee or devisee dies before the testator, but that this result does not follow where a contrary provision is found in the will. In the instant case we are of the opinion that the \$5,000 legacy mentioned in paragraph four of the will did not lapse by reason of the fact that Florence Rohrer died before the testatrix, because it is expressly stated in paragraph seven of the will that "In case of the death of any of my above devisees [legatees], except my nieces, Florence Rohrer and Emily Morris, prior to my death, then such devisee [legatee] or devisees [legatees] shall lapse to my estate." From this provision it is clear that the testatrix intended that the legacies provided

for her nieces, Florence Rohrer and Emily Morris, should not lapse in case either or both of them pre-deceased her. For us to hold that the \$5,000 mentioned in paragraph four of the will lapsed, would require us to hold contrary to the express language of the will. This we are not authorized to do under the will. But it is said that this \$5,000 legacy to Florence Rohrer lapsed because the testatrix did not point out who should receive the \$5,000 in case of the death of Florence Rohrer before that of the testatrix. In support of this counsel cite Weerner on American Law of Administration (3rd ed. p. 1467) where the author said: "The direction that the legacy shall not lapse in case the legatee die before the legacy is payable, is sufficient to prevent the lapse, if some other recipient thereof is pointed out; but the declaration that the devisee or bequest shall not lapse does not per se prevent such lapse."

In the instant case we are of the opinion that the testatrix by the language used in paragraph seven, intended that in case her niece Florence Rohrer pre-deceased her, the \$5,000 should not lapse but should go to the heirs of Florence Rohrer.

With reference to the provision made in paragraph eight to Florence Rohrer and Emily Morris, her nieces, there is no provision that any property that passed under that paragraph should not lapse in case either or both of the nieces died before the testatrix, so that, since Florence Rohrer died before the testatrix, the provision made for her in paragraph eight of the will lapsed and passed as intestate property to the heirs of the testatrix.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

220 - 31831

In the Matter of the Estate
of MARGARET ROBERSON, Deceased.

Appeal of NELLIE LEAVITT et al.,
Appellants.

}
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.
}

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The same questions are involved in the instant case as those in case No. 31830, the opinion in which case is this day filed. For the reasons there stated the judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Hatchett, F. J., and McEurely, J., concur.

Page 2 of 2

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CHARLES RICHMOND, Doing Business
as ECONOMICAL TIRE & SUPPLY CO.,
Appellee,

vs.

UNIVERSAL TIRE & RIM CO., a
Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover \$158.20 claimed to be due for certain automobile tires sold and delivered to the defendant. To plaintiff's statement of claim the defendant filed an affidavit of merits, wherein it denied generally that it owed the plaintiff the \$158.20 or any other amount. The affidavit further set up that the defendant had entered into a contract with the plaintiff to purchase 174 automobile tires; that the plaintiff failed and refused to make delivery and the defendant was required to go into the open market to purchase the tires and was required to pay \$317.40 more than the price at which plaintiff had agreed to sell them. The affidavit further sets up certain facts tending to show that defendant was entitled to \$18.70 as a rebate, and that "the defendant is not indebted to the plaintiff in any sum whatsoever, but to the contrary the plaintiff is indebted to this defendant in the sum of not less than One Hundred seventy-seven and 90/100 (\$177.90) dollars after deducting the sum of One Hundred fifty-eight and 20/100 (\$158.20) dollars which the plaintiff claims." The defendant also filed a claim for set-off, setting up substantially the same matters as those set up in its affidavit of merits. Plaintiff replied and denied that he had agreed to sell the defendant the tires as the defendant had alleged. The case was tried before the court without a jury, the court found against the defendant on its set-off, and in favor of

the plaintiff on his statement of claim and judgment was entered in plaintiff's favor for the amount of his claim.

The evidence tended to show that defendant wanted to buy some automobile tires and called up plaintiff; that plaintiff told defendant to go to the Firestone people and get the tires as plaintiff had none on hand; that this was done, the tires delivered to the defendant, charged to the plaintiff by the Firestone people and paid for by the plaintiff. There is no merit in the defendant's contention that the evidence fails to show that he owed the plaintiff \$158.20. The facts as above stated were testified to by plaintiff and there is no dispute. In fact, the testimony of the witnesses for the defendant is entirely in accord with plaintiff's testimony. Moreover, the defendant in its affidavit of merits admits that it owed the plaintiff \$158.20, as appears from the statement of the pleadings.

The defendant contends that the judgment is wrong because the court should have found in its favor for the amount of its set-off. Witnesses for the defendant gave testimony tending to show that it had bought automobile tires from plaintiff which the latter failed to deliver and that defendant was compelled to buy at a higher price, but this testimony was contradicted by the plaintiff. The court saw and heard the witnesses testify and found in favor of plaintiff's version, and it is clear that we would not be warranted in disturbing the finding.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Matchett, P. J., and McCurely, J., concur.

[illegible]

241 - 31852

JOHN BARNA,
Appellee,

vs.

J. C. SMITH,
Appellant.APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries claimed to have been sustained by being struck and injured by defendant's automobile. There was a trial before a jury and a verdict and judgment in plaintiff's favor for \$5,000.

The record discloses that about 8:20 in the morning of September 27th, 1924, the plaintiff was injured by coming in contact with defendant's automobile in Western avenue near 71st street. The evidence offered on behalf of the plaintiff tended to show that on the morning in question plaintiff was a passenger on a southbound street car in Western avenue; that the south terminus of the street car was at 71st street, an east and west street in Chicago; that when the street car was a short distance north of 71st street it was stopped at the usual place to discharge passengers and preparatory to returning north, on its northbound trip on Western avenue; that plaintiff and another passenger were the only ones in the car at the time it reached its destination; that the motorman opened the front exit door of the street car, which was one of the pay-as-you-enter type, to permit the two passengers to alight; that August Swanson, the other passenger, alighted from the car and started west toward the west curb; that plaintiff was seated near the front of the street car and followed Swanson, going out from the front vestibule door of the street car; that after he had gone a few steps west in the west roadway of Western avenue he was struck by the de-

defendant's automobile, thrown down and severely injured; that defendant's automobile was being driven south in Western avenue, following the street car, and that when the car came to a stop the automobile continued past the car without giving any warning and plaintiff was struck and injured.

The driver of the automobile, called by defendant, testified that he was following the street car south in Western avenue, driving the defendant's Ford automobile; that when the street car stopped, just north of 71st street, he stopped the automobile a few feet behind the car and waited; that the street car men were adjusting the steps preparatory to making the return trip; that thereupon he started the automobile to the west of the car; that when he was opposite the car he drove near the west curb of the street and stopped; that at that time plaintiff alighted from the front door of the street car, ran west across the street into the automobile and was injured.

The defendant contends that the judgment is wrong and should be reversed because all the evidence shows that plaintiff was not in the exercise of due care for his own safety and that the defendant was guilty of no negligence. And it is argued that the evidence supported defendant's version of the matter as testified to by the driver of the automobile. Upon a careful consideration of all the evidence, we think it clear that the question of whether plaintiff was in the exercise of due care for his own safety and whether he was injured through the negligence of the defendant, were questions of fact for the jury. We are also of the opinion that the evidence warranted the finding of the jury; and certainly we could not say that the finding of the jury is against the preponderance of the evidence.

The defendant further contends that three instructions given at the request of the plaintiff were prejudicial and warrant

this court in reversing the judgment, because, it is stated, plaintiff's case is weak on the essential points of negligence and on the question of due care on the part of the plaintiff. The contention is that the jury were told by the first instruction that while the burden of proof was on plaintiff to prove his case by a preponderance of the evidence, still if the jury found the evidence preponderated but slightly in plaintiff's favor, it would be sufficient; that the jury were told by instruction two that the plaintiff was not required to exercise the highest degree of care; and by the third instruction the jury were instructed that plaintiff was not required to prove his case beyond a reasonable doubt. The Supreme Court in the case of Peter v. Spooner, 305 Ill. 198, criticised the giving of instructions which used language similar to that of the first instruction; but we think we would not be warranted in disturbing the judgment in the instant case for this reason. The court gave five instructions on behalf of the plaintiff and twenty-one on behalf of the defendant. One of the instructions submitted by the defendant and given by the court told the jury that the defendant was not required to exercise the highest degree of care to avoid the accident, but that he was required to exercise only ordinary care. This was somewhat similar to instruction two complained of, and it was not error to tell the jury that the plaintiff was not required to prove his case beyond a reasonable doubt. A consideration of all the instructions leads us to the conclusion that there was no substantial error in them. The issues involved in the case were simple and easily understood.

The court modified an instruction given by the defendant, and this modification is said to constitute substantial error. The instruction as submitted by the defendant was to the effect that they must not compromise between the question of liability and the amount of damages, nor arrive at a verdict by chance, and that no

This court in reviewing the findings, however, it is stated, that
right was to look on the evidence of negligence and on the
evidence of the fact of the plaintiff's negligence. The question
is that the jury were told by the first instruction that while the
burden of proof was on plaintiff to prove his case by a preponderance
of the evidence, still in the jury found the evidence preponderated
not slightly in plaintiff's favor, it would be sufficient; that the
jury were told by instruction two that the plaintiff was not required
to establish the highest degree of care; and by the third instruction
the jury were instructed that plaintiff was not required to prove the
case beyond a reasonable doubt. The second found in the case of
Kline v. Johnson, 200 Ill. 186, explained the duty of plaintiff;
Kline where such language should be used in the first instruction;
but we think we would not be warranted in following the language
in the second case for this reason. The court gave five instruc-
tions on behalf of the defendant and gave none on behalf of the
plaintiff. One of the instructions submitted by the defendant was
given by the court and the jury found the defendant was not required
to establish the highest degree of care to avoid the accident, but
that he was required to exercise all ordinary care. This was error
which should be corrected in the amended 47, and it was not error
to tell the jury that the plaintiff was not required to prove his case
beyond a reasonable doubt. A correction of all the instructions
leads us to the conclusion that there was no prejudicial error in them.
The second instruction in the case was simply not really necessary.
The court omitted an instruction given by the defendant
and, and this omission is said to constitute substantial error.
The instruction submitted by the defendant was to the effect that
they must not communicate between the question of liability and the
amount of damages, but they do it a variety of times, and that no

juror should consent to a verdict which did not meet with the approval of his own judgment and conscience after due deliberation with his fellow jurors, and after considering all the evidence and the instructions of the court. To this the court added a provision telling the jury that it was their duty to honestly and fairly confer with their fellow jurors to endeavor to arrive at a verdict based on the evidence and the law which would meet with their conscientious approval. We think there was no prejudicial error in the modification, and, in view of the issues involved, we would not be warranted in any view of the case in disturbing the judgment on account of the instructions.

A further point is made that the damages awarded are excessive. The evidence shows that the plaintiff was about forty-five years of age at the time of the injury; that he was a carpenter and earned from forty to forty-five dollars a week; that his health was good; that as a result of the injury he suffered an inguinal hernia and a fracture of the coccyx; that he was laid up for about eight months and that in the endeavor to reduce the hernia two surgical operations were necessary. It further appeared that he will never be able to perform the work as he did prior to the injuries, and that he was not able to earn as much after the accident as before - that his wages were less after the accident. We are clearly of the opinion that we would not be warranted in holding that the judgment was so excessive as to warrant interference on our part.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, F. J., and McSurely, J., concur.

CHARLES C. DOSE,
Appellee,

vs.

THOMAS G. GRAVENITIES,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$750 which he claimed was the balance due him for installing an automatic oil burning system. The defense was that the system installed did not work properly; that it gave trouble continuously from the time it was installed in October, 1925, and that thereafter, about September of the following year, defendant was compelled to remove the oil burner and install one of a different kind. The case was tried before a jury and there was a verdict and judgment in plaintiff's favor for the amount of his claim, and the defendant appeals.

The record discloses that the defendant had a piece of improved real estate, the building consisting of stores and apartments, and that the steam heating plant did not give satisfaction; that he was solicited by plaintiff for an order to permit him to install an automatic oil burning system; that before the contract was entered into between the parties, plaintiff examined defendant's premises to see if his proposed system would work satisfactorily, and upon defendant receiving a favorable report, the parties entered into a written contract whereby plaintiff agreed to install in defendant's premises the automatic oil heating system for \$1,000, \$250 of which was paid at the time and the balance of \$750 was to be paid thirty days after the plant was installed. The plant consisted of a 1500 gallon tank, which was to be installed in the basement, and an oil burner, and the contract provided that if the burner did not work properly plain-

tiff would remove it, the defendant retaining the tank for which the plaintiff was to keep the \$250. The contract guaranteed that the plant when installed would be mechanically perfect.

On the trial of the case it was agreed by the parties, since the defense interposed was an affirmative one, that the burden was on the defendant and he proceeded with his evidence. The defendant and other witnesses gave testimony tending to show that the plant never worked properly from the time it was installed, but that there was trouble continually from the beginning and during the entire winter; that tenants complained that there was no heat; that the defendant repeatedly notified plaintiff that the plant was not working properly and that plaintiff and his employees called at the plant numerous times and endeavored to correct the matter but without success; that the defendant was notified by the Health Department that there was not sufficient heat in the building and that defendant brought this to the plaintiff's attention, and plaintiff repeatedly tried to make the plant work properly, but without success; that finally about September, 1926, defendant removed the burner and installed one of a different make.

Plaintiff and witnesses called on his behalf testified that after the plant was installed there were a number of complaints made by the defendant and each time the plaintiff or his representative went to the building, adjusted the difficulty, and that no complaint was made after the first of the year; that he called on the defendant for payment in January and that the defendant said he had no money to spare, ran out on the street and said he would send the check. Further testimony was given on behalf of the plaintiff to the effect that the reason the plant did not properly work was because the defendant gave it no attention, did not oil it, stuck matches in the vents and otherwise neglected the plant.

The defendant contends that the finding of the jury is against the manifest weight of the evidence. We have carefully considered all the evidence in the record and are far from satisfied that the plant was as represented before the contract was made; that it did not come up to the promises, as is often the case. There is no merit in plaintiff's argument to the effect that the reason the plant did not work properly at the beginning was because the janitor who had charge of it did not have technical knowledge. If this was required, it is obvious that few of these plants would be sold.

While, as we have said, the evidence is far from satisfactory, yet we are unable to say after carefully considering all the evidence in the record, that the finding of the jury is against the manifest weight of the evidence. They saw and heard the witnesses testify and accepted plaintiff's version of the matter. Likewise the trial Judge saw the witnesses and heard them testify and he approved the finding of the jury. They were in a much better position to determine the truth of the matter than are we, sitting in a court of review; and while it is our duty and we do not hesitate to reverse the finding of a jury where we are of the opinion that the finding is against the manifest weight of the evidence, yet in the instant case we are unable to say that the finding of the jury is against the manifest weight of the evidence. In these circumstances the judgment of the Municipal court of Chicago must be affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

FULTON MARKET GOLD STORAGE
COMPANY,

Appellee,

vs.

ROSEA P. MYERS,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On May 26, 1926, plaintiff brought suit in the Municipal court of Chicago against the defendant on a promissory note for \$780.54, made by the defendant and payable to plaintiff. The note by its terms was payable in three instalments, the last being due April 11, 1926. On June 9, 1926, the appearance of the defendant was entered by his counsel and on the next day, on motion of the defendant, he was given twenty days within which to file his affidavit of merits. In accordance with this rule the defendant filed his affidavit of merits on June 30, 1926. On September 9, 1926, the defendant moved the court for leave to file a demand for a jury, which was denied. On October 21, 1926, when the cause came on for trial he again renewed his demand for a jury, which demand the court denied. The case was then tried before the court without a jury, plaintiff put in his evidence and the defendant refused to put in any evidence. The court found the issues in favor of the plaintiff and assessed his damages at \$780.54, judgment was entered on the finding and the defendant appeals.

Plaintiff's evidence shows among other things that on January 11, 1926, defendant wrote it a letter in which he enclosed the note in question and which letter is as follows: "Enclosed please find a note for \$780.54 made according to an understanding with your Mr. Appel. I am making strenuous efforts to raise money to pay a substantial sum on account in the near future. If I had not suffered a great loss by reason of a severe hail storm and long continued dry weather this account would have been settled."

THE UNITED STATES OF AMERICA
DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF
JAMES EARL RAY, DECEASED
BY WILLIAM F. BAKER, ATTORNEY AT LAW
PLAINTIFF
VS.
THE UNITED STATES OF AMERICA
DEFENDANT

COMES NOW the Plaintiff and Defendant and moves the Court for an order that the Defendant pay to the Plaintiff the sum of \$100,000.00.

On May 22, 1968, Plaintiff brought suit in the District Court of Columbia against the Defendant on a promissory note for \$100,000.00, made by the Defendant and payable to Plaintiff. The note is for the sum of \$100,000.00 in legal tender, the sum being due on May 22, 1968. On May 2, 1968, the Defendant at the Defendant's residence at his residence and on the same day, he mailed to the Defendant, he was given twenty days within which to file his affidavit of denial. He answered this with the Defendant's affidavit of denial. He answered this with the Defendant's affidavit of denial on May 22, 1968. On September 2, 1968, the Defendant moved the court for leave to file a motion for a jury, which was denied. On October 22, 1968, when the court was on the trial he moved to remove his cause for a jury, which caused the court to deny. The court was then tried before the court without a jury. Plaintiff says he has the witness and the Defendant refused to pay in any evidence. The court found the money in favor of the Plaintiff and awarded the sum of \$100,000.00. Plaintiff was satisfied with the result and the Defendant was not.

Plaintiff's witness gave sworn evidence that James Earl Ray on January 12, 1968, Defendant wrote him a letter in which he offered the note in question and said that it was for \$100,000.00. Plaintiff then on May 22, 1968, he made something to be made something with your \$100,000. I am making statement about the money which is my \$100,000.00 and is received in the same letter. It is not that I collected a \$100,000.00 from a person who said that he was not concerned by getting this money which was from Ray.

In this court the only point raised by the defendant is that the court erred in refusing his motion for a jury trial. This question has been settled adversely to defendant's contention. Morrison Hotel Co. v. Kirener, 245 Ill. 431; Morabach v. Waddell, 210 Ill. App. 12. These two cases hold that the section of the Municipal Court Act which provides that every civil suit at law shall be tried by the court without a jury, unless the plaintiff at the commencement of such suit, or the defendant at the time he enters his appearance shall file with the clerk of the court a demand, in writing, for a trial by jury, is valid. In the instant case the defendant entered his appearance on June 9th. On the next day, in accordance with his motion, he was given twenty days within which to file his affidavit of merits. He filed his affidavit of merits on June 30th, but made no demand for a jury trial until September 9th. It is obvious that this was too late.

There is clearly no merit in this appeal and it is equally clear that it was prosecuted solely for delay, as plaintiff contends. Not only does the record show that the suit was brought on a note signed by the defendant and payable to plaintiff, but the defendant enclosed it in a letter in which he admitted the indebtedness. By Sec. 23 of chap. 33, Cahill's 1927 Statutes, it is provided that in every case if the judgment of the trial court is affirmed, the party prosecuting the appeal shall pay to the opposite party a sum not exceeding ten per cent of the amount of the judgment appealed from, provided the court of review shall be of the opinion that the appeal was prosecuted for delay.

The judgment of the Municipal court appealed from is affirmed with five percent (5%) damages.

AFFIRMED, WITH DAMAGES.

Matchett, P. J., and McSurely, J., concur.

REGINA MINNITZKY, Administratrix of
the Estate of Joseph F. Cihak,
Deceased,

Appellee,

vs.

ILLINOIS NORTHERN RAILWAY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff as administratrix of the estate of Joseph F. Cihak, deceased, brought an action against the defendant, under the Federal Employers' Liability Act, to recover damages occasioned by the fact that Cihak, a railroad switchman, lost his life through the alleged negligence of the defendant. The case was tried before the court and a jury, there was a verdict and judgment in plaintiff's favor for \$22,500, and the defendant appeals.

It appears from the evidence that Cihak was a practical railroad man and had worked for the defendant as a switchman for about nine years in the railroad yards at or near where he was fatally injured; that about 1:50 o'clock in the morning of May 21, 1925, a train of forty-three cars with an engine on each end, was being operated by the defendant in interstate commerce. Just before the accident the train was standing on its tracks near 26th street and Western avenue in Chicago. The section of the track was, roughly speaking, "rainbow-shaped," as stated by defendant's counsel. Plaintiff was one of a crew on engine No. 24, which engine was coupled by its head to the freight train; that part of the train stood in a general north and south direction. Engine No. 11 on the other end of the train was attached to the car in the regular way by its tender, and that part of the train stood in a general east and west direction. A car had become derailed about the middle of

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IN SENATE
JANUARY 14, 1914
REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
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ALBANY: J.B. LIPPINCOTT COMPANY, PRINTERS
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the train and as a result the train was stopped and the deceased, Cihak, who was the rear switchman, connected with the crew of engine No. 24, went to the point where the car was derailed. He went under the car next east of the one derailed to adjust a bridge-rod, which apparently had been displaced by the derailment. It was necessary for someone to adjust the bridge-rod so that the car could be re-railed. A number of members of the crew from engine No. 11 were standing around, one of them holding a lamp so that Cihak could work; while he was at work engine No. 11 started up, moved the car under which Cihak was working, and he was so injured that he died at eleven o'clock the same day. Prior to the time of the accident that part of the train to the south of the derailed car was uncoupled. At the place in question there was a viaduct over Western avenue, the tracks descending sharply about 18 feet in a distance of 750 feet into the McCormick Harvester yards. Engine No. 11 stood near the foot of this incline, holding the train from running back down the grade.

Arthur F. Worthley, the engineer of engine No. 11, called by the plaintiff, testified that they had been switching in the yard and that the train had been stopped because something was apparently wrong; that after they had been standing about thirty minutes his fireman, who was on the left or north side of the engine, told him that there was a signal from the left side of the train and to go ahead; that the witness said that they had better wait a minute, since one of the crew of that engine had gone back to see what was wrong and had not returned; "I told him we ought to wait until the man came from the rear of the train, as long as we did not know what was wrong." But apparently being urged further by the fireman, he started the engine. After it had moved about fifty feet there was one long whistle from engine No. 24 on the other end of the train, and immediately the train was stopped. It

was during this movement that Cihak was fatally injured. This witness further testified that a switchman of their crew, Ira F. Bair, was the man who was sent back to see what was wrong; he testified, "I sent him to go down and see what was wrong, whether there was a car off, or whether we were into the roundhouse or what. That must have been twenty minutes before I started the engine. He did not report back to me."

Ira F. Bair, the switchman, called by plaintiff, testified that at the time in question he was head man on engine No. 11; that the other men of the crew were Aird and Morris; that Morris was the conductor, but was dead at the time of the trial; that he did not know where Aird was; that before the accident he was near engine No. 11 when it was standing; that he was on the ground and kept looking back for a sign; that he stood there until he got tired and walked up to where the car was derailed; that before going he talked with George Magnusen, the fireman of engine No. 11; that Magnusen said to the witness, "I wonder whether there is a car off," and the witness replied that he supposed it was up around the roundhouse; that he could not see any signals or anything; that when the witness walked to where the car was derailed he found Cihak under the end of the car trying to lift up a switch-point; that the bridle-rod, which is a block to hold the two points of the switch so that they will not come together, was bent and Cihak was trying to loosen up this; that he did not see Cihak under the car, but heard him pounding; that it was rather dark; they just had their lamps; that Morris and Aird of crew No. 11 were there; that the car started ahead and "I yelled to get out, and grabbed my lamp and started to signal the engine to stop;" that the car moved about two lengths and that Cihak was badly injured. The evidence further shows that other men were working at night near the roundhouse; were at the car while Cihak was under it.

Magnusen, the fireman who was with Worthley, the engi-

neer of No. 11, and who told Worthley that he had seen a signal and to go ahead, was not called to testify, although he was still working for the defendant. There is other evidence in the record, but what we have stated is sufficient.

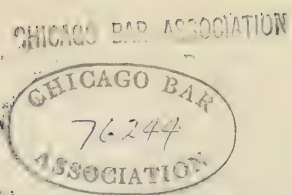
The defendant in its brief contends that the court erred in over-ruling its motion for a directed verdict at the close of all the evidence, for two reasons, as stated by counsel: "(a) Because the decedent's negligence was equal to or greater than that of the defendant;" and "(b) Because the decedent assumed the risk of death or injury when he went under the car." Substantially all of counsel's brief is taken up in the argument of the first point. The evidence is analyzed and it is contended that the deceased was guilty of negligence equal to or greater than that of the defendant, and that under the law in such circumstances the defendant was not liable and the court should have directed a verdict for the defendant as requested. Afterwards, when the brief of plaintiff was filed, in which attention was called to the fact that the Supreme Court of the United States in Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, and Seaboard Airline v. Tilghman, 237 U. S. 499, had held that under the Federal Employers' Liability Act, where a person was injured or killed as a result of the combined negligence of himself and his employer, his negligence did not defeat a recovery, but should be taken in consideration by way of diminution of damages, the defendant in its reply brief conceded that in view of the cases above cited their first point was untenable, and it was expressly withdrawn.

(a) It is obvious that under the authorities cited the contention of the defendant is unsound. The negligence of the deceased would not bar a recovery unless such negligence was the sole cause of his death; and in fact this was the theory upon which the case was tried, as shown by an instruction given at the

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. He or she will then gather information about the problem and the people involved. This information will be used to develop a plan of action.

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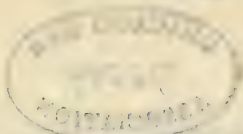
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request of the defendant.

(b) Did the deceased assume the risk, as counsel for the defendant contend, and therefore there should have been a directed verdict for the defendant? Sec. 4 of the Federal Employers' Liability Act is as follows: "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe." In passing on this section the Supreme Court in Boldt v. Pennsylvania R. R. Co., 245 U. S. 441, said: "In Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 'It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action.'" At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment caused by his master's negligence which are obviously or fully known and appreciated by him. And in the case of Ches. & Ohio Ry. Co. v. Preffitt, 241 U. S. 462, the court said that the employe (p. 468) "is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is plainly observable that he must be presumed to have known^{of} it."

At the request of the defendant the court gave two instructions on this question. The instructions were Nos. 7 and 8. By instruction 7 the jury was told that the defendant was not charged with the violation of any statute enacted for the safety of its employes, and therefore Cihak, "as a matter of law and for the



request of the defendant.

(b) Did the defendant assume the risk, as charged?

For the defendant's motion, and the evidence thereon, should have been

admitted, and the defendant's motion should have been

granted, and the defendant's motion should have been

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purposes of this case, assumed the risk of injury or death due to any dangerous work or conditions in and about his employment which were open and obvious and capable of being understood and appreciated by him," that if the jury believed from the evidence that Cihak knew of the hazard involved or had equal opportunity with the defendant of knowing it, but went under the car on his own initiative, without objection, and was killed, then he took the risk and no recovery could be had. And by instruction 8 the jury were told that if they believed from the evidence that Cihak "knew or had equal opportunities with the defendant of knowing the danger involved in going under the car in question, but nevertheless went under the car without objection," no recovery could be had. We are clearly of the opinion that these instructions went as far as warranted. The jury having found in favor of the plaintiff, we certainly would not be justified in disturbing their verdict on this question. The evidence shows that Cihak was in discharge of his duties under the car and that three of the crew of engine No. 11 were at the place where he was working, one of the men having gone there from engine No. 11 to find out what the trouble was. The evidence shows that the engineer and fireman of No. 11 knew that something was wrong and that probably a car had been derailed. They also knew that Bair, the head switchman of their crew, had gone down to see what the trouble was and that he had not returned. The fireman who told the engineer that there was a signal to move the train was not called, although he was still in the employ of the company, and apparently no effort was made to call him. In these circumstances we are clearly of the opinion that the evidence warranted a finding by the jury in favor of the plaintiff.

In the reply brief counsel for the defendant for the first time argue that there should have been a directed verdict in its favor because the evidence shows that the defendant was guilty

of no negligence and that Cihak met his death as a result solely of his own negligence. Aside from the fact that such contention cannot be made for the first time in the reply brief, we are of the opinion, as appears from what we have already said, that this contention is without merit.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

at the same time, it is not possible to say that the
of his own country. It is not the case that the
cannot be made for the time being, but we are
position, as a matter of fact, it is not
position in the world.

The Government of the United States is not

in a position

to do so.

Respectfully,
Sincerely,
Very truly yours,
The President of the United States

248 - 31378

JOSEPH McGLASHAN and J. N. SCOTT,
co-partners, trading as
McGLASHAN AND SCOTT,

Appellees,

v.

ELGIN, JOLIET AND EASTERN RAILWAY
COMPANY, a corporation,

Appellants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

On April 9, 1925, the plaintiffs, McGlashan and Scott, a partnership, brought suit in the Municipal Court against the defendant, Elgin, Joliet and Eastern Railway Company, to recover damages claimed to have been sustained on account of the delay in the transportation of two cars of cattle. There was a trial before the court, without a jury, and a finding and judgment in favor of the plaintiff for \$500.00. This appeal is therefrom.

On March 13, 1923, the plaintiffs, who were live stock dealers at McGlashan Spur, located on the line of the defendant railroad, three miles from Frankfort, requested the defendant by telephone to furnish two cars in which to transport forty-four cattle to the Union Stock Yards, Chicago. The defendant furnished the cars and they were loaded by the plaintiffs between 4 and 5 A. M., March 20, 1923 and left at 4:30 A.M. The cars were routed via the defendant, Elgin, J. & E. Ry. Co. and the C.R.I. & P. The cattle had been kept in pens until the two cars

Page - Five

APPEAR FROM	THAT KOSIACHEN AND A. H. BENT
WARRANTED ENTRY	INVESTIGATION, THROUGH AN
IN BIRMINGHAM	WARRANTED AND ENTRY
	APPEAR FROM
	THAT KOSIACHEN AND A. H. BENT
	INVESTIGATION, THROUGH AN
	WARRANTED AND ENTRY
	APPEAR FROM

Opinion filed Oct. 19, 1937.

THE FOLLOWING OPINION WAS DELIVERED BY

Opinion of the court.

On April 9, 1937, the plaintiff, Kosiachan and
 foot, a partnership, brought suit in the Municipal Court
 against the defendant, Elgin, Elgin and Western Railway
 Company, to recover damages claimed to have been sustained
 on account of the delay in the transportation of two cars
 of cattle. There was a trial before the court, without a jury,
 and a finding and judgment in favor of the plaintiff for
 \$500.00. This appeal is therefrom.

On March 18, 1937, the plaintiff, who were five
 stock dealers at Kosiachan Spur, located on the line of
 the defendant railroad, three miles from Frankfort, re-
 quested the defendant by telephone to furnish two cars in
 which to transport forty-four cattle to the Union Stock Yards,
 Chicago. The defendant furnished the cars and they were
 loaded by the plaintiff between 4 and 5 A. M., March 19,
 1937 and left at 6:30 A. M. The cars were routed via the
 defendant, Elgin, Elgin and Western Railway, and the
 The cattle had been kept in pens until the two cars

arrived at the spur. At the time the cattle were put on they were in good condition and none of them had been injured.

The route of the cars was from Frankfort to Joliet by the defendant railroad, the Elgin, J. & E. Ry. Co., then the C. R.I. & P. Rd. to Chicago. It is 51 miles from Frankfort to Chicago. If cars leave Frankfort at 1 or 2 A.M. they generally reach the stockyards at Chicago between 7 and 8 A.M. the same day. So J. R. McGlashan testified. McGlashan testified that cars loaded at 4:30 or 4:50 A.M. at Frankfort should arrive in Chicago by 11 A.M. The cars in question, so Beaudry, superintendent for the defendant testified, were taken and arrived at Joliet at 6:55 A.M. which was not only a reasonable but a good time; that afterwards the defendant delivered them to the C.R.I. & P. R.R., but in making the interchange the switch engine of the defendant was derailed. One Welts, delivering yard master at Blue Island, an employee of the Rock Island, testified that the two cars left McGlashan spur about 3 or 4 A.M. and arrived at Joliet at 6 or 7 A.M. and were delivered at once to the Rock Island railroad after being off the track; that he had something to do with them; that they arrived at Burr Oak, a station on the Rock Island, at 4:50 P.M.; that he held them from 4 P.M. to 11:50 P.M. when there was a stock train to take them; that the Rock Island could have made a special train and taken them to the stock yards, but they would not have gotten there in time for the market of March 20.

The evidence of the Assistant Yardmaster, Kennedy,

arrived at the spot. At the time the engine was not
as fast as it was when it was first
seen.

The route of the car was from Frankfurt to
Jailed by the defendant railroad, the engine, A. & E. W.
Co., then the A. & E. W. Co. to Chicago. It is also
from Frankfurt to Chicago. It says leave Frankfurt at 1
or 2 A.M. But possibly there are witnesses at Chicago
between 7 and 8 A.M. the same day. At 5 A.M. Wednesday
testified. Nicholson testified that was loaded at
4:30 or 4:40 A.M. at Frankfurt should arrive in Chicago
by 11 A.M. The case in question, so possibly, superintendent
for the defendant testified, was taken and arrived at
Jailed at 8:30 A.M. which was not only a reasonable but a good
time; that afterwards the defendant delivered them to the
G.R.I. & E. W. Co., but in making the transfer the switch
engine of the defendant was detailed. Got white, deliver
ing yard master at New Island, an employee of the Rock
Island, testified that the engine left the station about
about 3 or 4 A.M. and arrived at Jailed at 5 or 7 A.M.
and was delivered at once to the Rock Island railroad
after being off the track; that he had something to do
with them that they arrived at New Island, a station on
the Rock Island, at 4:30 P.M.; that he had been from
4 P.M. to 11:30 P.M. when there was a stock train to
take them; that the Rock Island could have made a special
train and taken them to the stock yards, but they could
not have gotten there in time for the stock of March 22.
The evidence of the defendant, Y. & N. Co., Kansas.

of the Rock Island at Joliet is that the two cars left McGlashan spur about 3 or 4 A.M. and arrived at Joliet between 6 and 7 A.M. and were immediately delivered to the Rock Island, after being off the track; that the two cars were received at Joliet about 7:15 or 7:30 A.M.; that after receiving them the Rock Island laid them up in the yards and then sent them out on the first train, which was at 3 P.M. to the Stock Yards at Chicago; that Mondays and Wednesdays are the stock days of the Rock Island and on those days it is customary to have several trains; that on other days, such as Tuesday, which was March 30, 1923, the Rock Island ran no stock trains between 7 A.M. and 3 P.M.

The market for cattle at the Stock Yards, Chicago, opens at 9 or 9:30 A.M. and closes at 3 P.M.

There is no reasonable doubt that the two cars arrived at Joliet at or before 7 A.M. and, in the exercise of reasonable diligence, should have been sent on to the Stock Yards on the Rock Island train that left, even on Tuesday, at 7 A.M. or earlier. If the derailment caused the delay, and the Rock Island saw fit, to side track the cars for an afternoon train, which delayed the delivery to the market of that day, it follows that the defendant must be held responsible for a negligent delivery. It was the obligation of the defendant to explain satisfactorily the cause of the delay. Shoot v. C.C.C. & St. L. R.R., 145 Ill. App. 532 - and it failed to do so. The evidence for the plaintiff showed that the time taken for the transportation was unusually long and, therefore, unless properly accounted for, was unreasonable

of the Rock Island as failed in that the two were left
McCluskey gave about 3 or 4 A.M. and arrived at Chicago
between 6 and 7 A.M. and were immediately delivered to the
Rock Island, after being out of the train; that the two were
then transported at Chicago about 7:15 or 7:30 A.M. that after
receiving from the Rock Island train then on in the yards and
then sent them out on the first train, which was at 8 P.M.
to the Stock Yards at Chicago; that Mondays and Wednesdays
are the stock days of the Rock Island and on these days it
is customary to have several trains; that on other days,
such as Tuesday, which was March 30, 1931, the Rock Island
ran no stock trains between 7 A.M. and 8 P.M.

The market for cattle at the Stock Yards, Chicago,
opens at 9 or 9:30 A.M. and closes at 3 P.M.

There is no reasonable doubt that the two cars
arrived at Chicago at about 7 A.M. and, in the morning
if reasonable diligence, should have been sent on to the
Stock Yards on the Rock Island train that left, even on Tues-
day, at 7 A.M. or earlier. If the defendant owned the
train, and the Rock Island was the, he also took the two cars
on afternoon train, which delayed the delivery to the market
of that day. It follows that the defendant must be held res-
ponsible for a negligent delivery. It was the obligation of
the defendant to explain satisfactorily the cause of the
delay. Moore v. U.S. Dist. Ct., 145 Ill. App. 232 -

and it failed to do so. The evidence for the plaintiff showed
that the time taken for the transportation was unusually long
and, therefore, unless properly accounted for, was unreasonable.

and evidence, prima facie of negligence. To that no sufficient defense was made.

It is urged that the two cars were moved from Joliet on the first available train to the Union Stock Yards. That may be true if we overlook the delay caused by the derailment, but the plaintiff is not, without evidence, to be charged with that delay. Perkins v. G. C. & St. L. R.R. Co., 183 Ill. App. 531. It was caused as far as the record shows by the fault of the defendant or the Rock Island, or both. There is ample evidence, we think, to show that, without negligence, the two cars, taken when they were, would have reached the Union Stock Yards in time for the market on March 20.

In our judgment the delay shown was unreasonable and was the result of the defendants want of ordinary diligence. It is contended for the defendant that the plaintiff did not comply with the tariff; that they failed to give the defendant a written order for cars. As, however, the two cars were actually furnished and loaded and the defendant then undertook to transport them, it does not matter what precipitated the meeting of the minds of the two parties, whether it was the result of the telephone or writing or otherwise. Davis v. Henderson, 266 U.S. 32, is not in point. In that case the cause of action was the failure to furnish a car within a reasonable time. Here that subject is not involved. The defendant actually furnished the cars, but failed in the reasonable transportation of them after they were loaded and the actual transportation began.

and evidence, writing being of negligence. To that no
affirmative answer was made.

It is urged that the two cars were saved from
Jailed on the first available train to the Union Stock
Yards. That may be true if we overlook the delay caused
by the derailment, but the plaintiff is not, without
evidence, to be charged with that delay. Boyle v.
U. S. M. & W. Co., 188 Ill. App. 201. It was
assumed on the record above by the Court in the
testament on the Rock Island, or both. There is ample
evidence, we think, to show that, without negligence,
the two cars, taken when they were, would have reached the
Union Stock Yards in time for the market on March 20.

In our judgment the delay shown was unreasonable
and was the result of the defendants' want of ordinary
diligence. It is suggested that the defendant was the
plaintiff did not comply with the writ; that they failed
to give the defendant a written order for cars. As, how-
ever, the two cars were actually furnished and loaded and
the defendant then undertook to transport them, it does not
matter what precipitated the moving of the minds of the
two parties, whether it was the result of the telephone
or writing or otherwise. Boyle v. Northwestern, 188 W.C. 20,
is not in point. It does show the cause of action was the
failure to furnish a car within a reasonable time. Here that
subject is not involved. The defendant actually furnished
the cars, but failed in the reasonable transportation of them
after they were loaded and the normal transportation began.

If the defendant had refused to furnish cars, whether on account of inability or any other reason than the question of proper notice might have been pertinent.

As to the damages, the statement of claim alleges that the defendant failed to deliver the cattle within a reasonable time; that it did not deliver them in the same condition as received; that it delivered them in "a deteriorated gaunted and shrunken condition"; that if delivered in a reasonable time they would have arrived for the market of March 20; that they were actually delivered to the market of March 21, when the market price had greatly declined; to the damage of the plaintiff in the sum of \$500.00.

It is alleged in the affidavit of merits, on the subject of damages, that it transported the cattle in a reasonable time. It is denied therein, that, because of any fault on its part, the cattle did not arrive in the same condition in which they existed at the time of shipment; denied that it made delivery of said cattle beyond a reasonable time in a deteriorated, gaunted, and shrunken condition; denied that the plaintiff suffered any loss because of any fault of the defendant.

With the pleadings in that form, in the Municipal Court, it is our judgment that the plaintiffs were bound to put in sufficient evidence to show what damages they had suffered. The record, however, does not show what the cattle weighed when they were put on board, nor what they weighed when they arrived or when sold; nor what the market

It is admitted that the cattle were delivered to the plaintiff in the month of January or any other month when the condition of the cattle might have been better.

As to the damages, the statement of the plaintiff is that the defendant failed to deliver the cattle within a reasonable time; that it did not deliver them in the same condition as received; that it delivered them in a deteriorated, damaged and otherwise condition; that it delivered in a reasonable time they would have arrived for the market of March 20; that they were actually delivered in the month of March 25, and the market value was thereby diminished to the damage of the plaintiff in the sum of \$100.00.

It is alleged in the affidavit of service, on the subject of damages, that it transported the cattle in a reasonable time. It is denied therein, that, because of any fault on its part, the cattle did not arrive in the same condition in which they existed at the time of shipment; denied that it made delivery of said cattle beyond a reasonable time in a deteriorated, damaged, and otherwise condition; denied that the plaintiff suffered any loss because of any fault of the defendant.

With the pleadings in this case, in the municipal court, it is our judgment that the plaintiff was bound to put in sufficient evidence to show what damages they had suffered. The record, however, does not show what the cattle weighed when they were put on board, nor what they weighed when they arrived on shore; nor when the market

price was on March 20, or on March 21, nor what they sold for. The damages claimed were, of course, unliquidated.

Rule 15 of the Municipal Court provides that "Allegations of unliquidated damages, special or general, need not be specifically denied but shall be deemed to be put in issue in all cases unless expressly admitted."

It follows, therefore, from what we have stated, that, although there is some evidence of a general nature as to how much cattle would shrink through such confinement, there is no evidence from which the court could make any rational deduction as to the amount, if any, of the damages suffered.

The judgment of the Municipal Court of Chicago will be reversed and the cause remanded.

REVERSED AND REMANDED.

HOLBOM AND WILSON, JJ. CONCUR.

which was on March 21, at 10:15 A.M., and that the same was
not. The witness stated that he never saw the defendant.

Rule 12 of the Municipal Court provides that
"allegations of official misconduct, whether or not
made and be specifically stated but shall be deemed to be
put in issue in all cases unless expressly admitted."

It follows, therefore, that what he has stated

that, although there is some evidence of a general nature
as to the fact that the defendant was a member of the
there is no evidence from which the court could make any
rational deduction as to the amount of the damage
suffered.

The judgment of the Municipal Court of Chicago

will be reversed and the cause remanded.

REVEREND AND HONORABLE

WILLIAM H. HARRIS, J. CLERK.

265 - 31397

A. M. KAN,

Appellee,

v.

MANDEL SENSIBAR and J. R.
SENSIBAR,
(Defendants)

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

On Appeal of

J. R. SENSIBAR,

Appellant.)

Opinion filed Oct. 19, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

This is an appeal from a judgment in the
Municipal Court in the sum of \$1,728.00 on a promissory
note in favor of the plaintiff, A. M. Kan, and against
the defendant, J. R. Sensibar, upon a directed verdict.
The note sued upon is as follows:

\$1,200.00

Gary, Indiana, May 10, 1922.

On or before seven months after date I promise
to pay, in gold coin, to the order of A. M. Kan,
Negotiable and Payable at the South Side Trust
& Savings Bank, Gary, Ind. Twelve hundred and
_____ Dollars For value received, with interest
at the rate of 7 per cent per annum from date payable
at maturity, with reasonable attorney's fees, with-
out relief from valuation and appraisal laws.

Mandel Sensibar - (Signed)
J. R. Sensibar - (Signed)"

The statement of claim set up that the \$1728.00
was made up of \$1200.00, principal; \$378.00 interest;
and \$150.00 attorney's fees. Summonses were issued, but

FILE - 111

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Opinion filed Oct. 19, 1937.

THE COURT OF APPEALS

Opinion of the court.

This is an appeal from a judgment in the

United States in the sum of \$1,232.00 on a promissory

note in favor of the plaintiff, A. E. Hall, and against

the defendant, J. E. Hall, with a directed verdict.

The note used upon is as follows:

May, 1936, May 19, 1937.

\$1,232.00

On or before seven months after date I promise
to pay, in full only, to the order of A. E. Hall,
payable and payable at the Bank of America
& Savings Bank, Inc., Twelve hundred and
thirty-two dollars and no cents, with interest
at the rate of 7 per cent per annum from date payable
at maturity, with reasonable attorney's fees, and
not liable from release and satisfaction.

Witness my hand and seal this 19th day of May, 1936.
J. E. Hall (Defendant)
A. E. Hall (Plaintiff)

The statement of claim set up shows the \$1,232.00

was made up of \$1,232.00 principal; \$123.20 interest;

and \$123.20 attorney's fees. Payments were made, but

only the defendant, J. R. Sensibar was served. J. R. Sensibar filed an affidavit of merits; and alleged therein that he had a good defense; (1) that he did not on May 10, 1922, make, execute and deliver the note; (2) that there was no consideration given by him; and (3) that he was not indebted to the plaintiff in any sum.

The evidence of the plaintiff is that he was a doctor; that the note was signed by Mandel and J. R. Sensibar; that it was given for money loaned to Mandel Sensibar. The evidence of J. R. Sensibar, called by the plaintiff under section 33 of the Statute, is that on July 31, 1925, he wrote a letter to the plaintiff in which he promised, "to clean up my endorsement of the note you hold;" and that on July 24, 1925, he wrote a letter to the plaintiff in which he stated, he "expected to have by August 17th enough money in, to substantially clean up my endorsement with you on father's note." He testified, also, that he executed the note, but at a later time than it bears date. After the foregoing evidence was put in and the note introduced, the plaintiff rested.

The evidence for the defendant consists of his own testimony and that of Mandel Sensibar. J. R. Sensibar testified that Mandel Sensibar, his father, brought the note to him at his office and said he had loaned at some previous time some money to Dr. Kan, the plaintiff, and that Dr. Kan wanted his, J. R. Sensibar's endorsement on the note. He was asked if he remembered when he signed it, and answered that it was somewhere around June 15, 1922. On

help the defendant, I. N. Gensler was asked, I. N. Gensler filed an affidavit of service and alleged that he had a good defense; (1) that he did not on May 10, 1934, send, receive and deliver the money; (2) that he was not in communication with him; and (3) that he was not indebted to the plaintiff in any way.

The evidence of the plaintiff is that he was a doctor; that the note was signed by Mendel and I. N. Gensler; that it was given for money loaned to Mendel Gensler. The evidence of I. N. Gensler, called by the plaintiff under section 15 of the statute, is that on July 11, 1934, he wrote a letter to the plaintiff in which he requested, "to clear up my endorsement of the note you held;" and that on July 24, 1934, he wrote a letter to the plaintiff in which he stated, he "requested to have by August 15th enough money to, or substantially clear up my endorsement with you on father's note." He testified also, that he received the note, but at a later time than it came there. After the foregoing evidence was put in and the note introduced, the plaintiff rested.

The evidence for the defendant consists of his own testimony and that of Mendel Gensler. I. N. Gensler testified that Mendel Gensler, his father, brought the note to him at his office and said he had loaned it some previous time some money to Dr. Mendel, the plaintiff, and that Dr. Mendel told I. N. Gensler's endorsement on the note. He was asked if he remembered when he signed it, and answered that it was sometime around May 15, 1934.

motion of counsel for the plaintiff that the answer undertook to vary the terms of the note, the court struck it out. The evidence of Mandel Sensibar is that he gave no consideration to J. R. Sensibar for the latter's signature to the note; that the signature was put in about the middle of June, 1922. No more evidence was offered.

At the close of the defendant's evidence counsel for the plaintiff moved the court to direct the jury to find for the plaintiff, and the motion was allowed.

It is difficult to understand the attitude of the defendant in trying to make out a defense to such an obvious liability. He signed the note as a co-maker with his father. The note recites on its face, "We promise to pay," and below are the two signatures. He wrote twice to the plaintiff, each time admitting his liability. Of course, he was not an endorser, but a joint maker, subject to all the obligations of a maker. Whether he signed it on May 10 or in June, made no difference in his liability. Further, the note was given for a good consideration. As far as Mandel Sensibar was concerned, and if J. R. Sensibar signed as an accommodation maker, he was not entitled on that account to be relieved of liability. Naef v. Potter, 226 Ill. 629; Cahill's Rev. Statutes, Chap. 38, Sec. 49.

As to the matters of evidence discussed by counsel for the defendant, the abstract of record shows no objections and proffers as would in any reasonable way justify holding that the trial judge erred, upon the evidence before him, in directing a verdict for the plaintiff.

motion to dismiss for the plaintiff that the answer setting
forth as well as the facts of the case, the court should be
The evidence of which the plaintiff is not in possession
motion to J. R. Hamilton for the plaintiff's signature to the
note; that the signature was not in front of the middle of
June, 1902. No more evidence was offered.

At the close of the defendant's evidence counsel
for the plaintiff moved the court to direct the jury to
find for the plaintiff, and the motion was allowed.

It is difficult to understand the attitude of
the defendant in trying to raise out a defense to such an
obvious liability. He signed the note as a co-maker with
his father. The note recites on its face, "he promises to
pay," and below are the two signatures. He wrote twice to
the plaintiff, each time admitting his liability. Of course,
he was not an endorser, but a joint maker, subject to all
the liabilities of a maker. There is signed to him in
his name, made no difference in his liability. Further,
the note was given for a good consideration. He has no honest
doubt as to the fact that J. R. Hamilton signed as an
accommodation maker, he was not entitled on that account
to be relieved of liability. Hamilton v. Hamilton, 100 Ill. 400;

Hamilton v. Hamilton, 100 Ill. 400.

As to the matter of evidence disclosed by counsel
for the defendant, the statement of record shows no objections
and problems as would in any reasonable way justify holding
that the trial judge erred, upon the evidence before him, in
directing a verdict for the plaintiff.

We are constrained to conclude that the defence was made for purposes of delay. The judgment, therefore, will be affirmed, with added damages in the sum of \$86.40.

AFFIRMED. WITH DAMAGES.

HOLDOM AND WILSON, JJ. CONCUR.

It was estimated at working that the balance
was made for purposes of relief. The balance, however,
will be retained, with some changes in the use of funds.

APPROVED WITH DAMAGES.

KOONAN AND SONS, 11, CHURCH.

381 - 31413

JOHN WOLTERS and MARTHA WOLTERS,

Appellees,

v.

JOHN STELK and ROY L. KRANZOW,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On March 23, 1926, the plaintiffs, John and Martha Wolters, brought suit in the Municipal Court of Chicago, in a first class case, against the defendants, John Stelk and Roy L. Kranzow, for the recovery of \$1500.00 and interest. There was a trial before the court, with a jury, and a verdict in favor of the plaintiffs, in the sum of \$1500.00. This appeal is from that judgment.

The evidence in the record shows, substantially, the following: - On April 14, 1920, Martha Wolters gave to the defendant, Kranzow, a certified check for \$1500.00. She was given in return, a receipt dated April 14, 1920, which is as follows:

"Received from John and Martha Wolter
Fifteen Hundred dollars for purchase of real
estate first mortgage."

It was signed, "Roy L. Kranzow."

On May 12, 1920, Kranzow wrote to Martha Wolters

THE COURT HAS CONSIDERED THE
 APPLICANT'S
 STATEMENTS AND THE EVIDENCE
 PRESENTED BY THE
 PROSECUTION AND THE
 DEFENSE.

Opinion filed Oct. 12, 1937.

MR. JUSTICE TAYLOR delivered the

opinion of the court.

On March 23, 1936, the plaintiff, John and
 Martha Wolters, brought suit in the Municipal Court of
 Chicago, in a first class case, against the defendant,
 John Smith and Roy A. Krammer, for the recovery of
 \$1500.00 and interest. There was a trial before the
 court, with a jury, and a verdict in favor of the plain-
 tiffs, in the sum of \$1500.00. This appeal is from that
 judgment.

The evidence in the record above, substantially,
 the following: - On April 14, 1936, Martha Wolters gave
 to the defendant, Krammer, a certified check for \$1500.00.
 She was given in return, a receipt dated April 14, 1936,
 which is as follows:

"Received from John and Martha Wolters
 fifteen hundred dollars for purchase of real
 estate from defendant."

It was argued, for the defendant,

On May 10, 1936, Krammer wrote to Martha Wolters

that the mortgage he intended to give her was about to be paid off, and that he was sorry, "because this will delay me in turning papers for the money in your hands. But at the same time, I have spoken to Judge Stelk about it, and he has said to advise you that your interest will run along just the same until I find it possible to give you a mortgage for your money."

On May 29, 1920, Kranzow wrote to Martha Walters as follows:

"Enclosed I am sending you investment agreement for \$1500.00, in duplicate, signed by Judge Stelk and myself, which kindly sign, together with your husband, on the lines indicated by pencil cross. After signing same, retain one copy and send the other to me."

There was offered in evidence a written agreement, which was signed by Roy L. Kranzow and John Walters, and which contained, at the bottom, the following: "I hereby guarantee the faithful performance of the obligations assumed by Roy L. Kranzow, whose signature is attached to the above agreement. (Signed) John Stelk." It was not signed by Mrs. Walters. That agreement purports to be between Roy L. Kranzow as party of the first part, and John and Martha Walters, husband and wife, as parties of the second part. It stated, among other things, that the parties of the second part turn over to the party of the first part, on the day of the agreement, \$1500.00 and

that the envelope be retained by him and not given to the
 wife, and that he was aware of the fact that the wife
 was in financial straits and the money in your hands. And
 at the same time, I have spoken to Judge Gault about it,
 and he has said to advise you that your interest will run
 along just the same until I find it possible to give you
 a settlement for your share.

On May 22, 1922, I wrote you in regard to this

as follows:

"I enclose I am sending you a check for \$100.00
 sent for \$100.00 in full, signed by Judge
 Gault and myself, which is the same as the
 your interest, on the line indicated by the
 first signed check, which was sent you and sent the
 other to me."

There was attached in evidence a written agreement,
 which was signed by Roy L. Kinnear and John Kinnear, and which
 contained, at the bottom, the following: "I hereby guarantee
 the faithful performance of the obligations assumed by Roy
 L. Kinnear, whose signature is attached to the above agree-
 ment." (Signed) John Kinnear. It was not signed by Roy.
 Kinnear. That agreement purports to be between Roy L.
 Kinnear as party of the first part, and John and Martha
 Kinnear, husband and wife, as parties of the second part.
 It stated, among other things, that the parties of the second
 part turn over to the party of the first part, on the day
 of the agreement, \$100.00 and

"authorize him to use the said money for any of the following purposes: in purchasing real property at bargain prices, to repair same, when necessary so that it can be readily sold or exchanged at a profit; to loan money on first and second mortgages on real property and to hold or dispose of such mortgages at a gain; to purchase safe and secure contracts for the sale or purchase of real estate at a discount and to again dispose of same at a profit; to purchase real estate at the lowest possible price and to erect suitable dwellings thereon, and then to dispose of the real estate, so improved, at a profit."

The contract, also, provided that the party of the first part would return all the money at any time, with certain qualifications, as to the payment of interest; that the parties of the second part would not claim any interest in any of the real or personal property which might be acquired with the money invested, but would limit their rights and claims to the proceeds of the sale or disposition of such property. It also provided that the party of the first part, on the tenth of January and the tenth of July, each year, would turn over to the parties of the second part a sufficient sum of money so that they would receive interest upon their investment at a rate of ten per cent per annum, and that he would return to the parties of the second part, on the tenth day of January and of July in any year, all of the money turned over to him, with accrued interest, as they may demand, "provided they shall have given him at least six months written notice of their desire to withdraw the money, either in whole or in part."

In April, 1923, Stelk wrote to Mrs. Martha Wolters that a number of people were clamoring for money, and that he had tried to satisfy them, and that he had arranged matters

so that he believed he could soon send her interest checks, and be in a position to meet all demands upon him. On January 19, 1924, Stalk wrote to Martha Wolters,

"I received your letter and I am certainly sorry that I must disappoint you for the 23rd. It is absolutely impossible for me to get this money together or any part of it. I am enclosing you a copy of a prospectus and a subscription contract which shows that I am doing my level best to cash in on my mortgages and get rid of some of my land. I believe that I will be able to accomplish something by March 1st. If you cannot do anything else you had better extend your mortgage for six months at my expense when I am sure that the matter can be taken care of."

On June 5, 1924, Stalk wrote to Martha Wolters, in answer to a letter from her, that he was extremely sorry that it would be an absolute impossibility for him to pay her on June 23rd, and suggested to her that if she could, to have a loan of hers, which was coming due, renewed for another six months; that by that time he thought he would be able to pay her. In the course of that letter, he said, "If I had known two years ago what I know today, I, of course, would not have taken the money and would have saved myself and you a great deal of embarrassment."

On June 16, 1924, Stalk wrote to Martha Wolters, in answer to a letter from her, "If it was not for the fact that I feel under very great obligation to you and to others who have placed their money with me in absolute confidence, I would not be here wearing away my life trying to settle things up * * * But I feel that I owe it to you and to others to straighten out things and to get you and every

we shall be believed to hold some such statement
which, and be in a position to meet all demands upon
him. On January 18, 1904, Stein wrote to Martha Webster,

"I received your letter and I am certainly
sorry that I must disappoint you for the time.
It is absolutely impossible for me to pay this
money because as you said at 121. I am unable
to pay a sum of a hundred dollars and a hundred
dollars would be more than I am doing my
best to pay as well as all my expenses and all
all of some of my land. I believe that I will
be able to accomplish something by March 1st.
If you cannot do anything else you had better
attend your mortgage for six months as my ex-
perience shows I am sure that the matter can be
settled very well."

On June 6, 1904, Stein wrote to Martha Webster,
in answer to a letter from her, that he was extremely
sorry that it would be an absolute impossibility for him
to pay her on June 15th, and suggested to her that if
she could, to have a loan of some, which was coming due,
removed for another six months; that by that time he
thought he would be able to pay her. In the course of
that letter, he said, "If I had known two years ago what
I know today, I, of course, would not have taken the money
and would have saved myself and you a great deal of en-
trouble."

On June 16, 1904, Stein wrote to Martha Webster,
in answer to a letter from her, "It is not for the last
that I feel under very great obligation to you and to others
who have placed their money with me in absolute confidence,
I would not have been willing to live living in such
things up. " " But I feel that I owe it to you and to
others to straighten out things and so get you and every

one else the money due."

On September 9, 1924, Stelk wrote to Mrs. Wolters, asking her to assist him in disposing of certain tickets in the nature of lottery tickets, at fifty cents a piece, in order to help him get money for his creditors.

On September 20, 1924, Stelk wrote to Martha Wolters, "I am in a position where it is an utter impossibility for me to write out any more checks for \$1500.00, or to obtain that much money at one time, under present circumstances. If you will be patient and allow the matter to rest, when I come to Chicago, which will be the first part of October, I will call on you and discuss the matter, and perhaps make some satisfactory arrangements. If, on the other hand, you proceed to carry out the threats that you have made, you will find that you will run up against the usury statutes of Illinois, as well as Alabama, and that you will be biting off your nose to spite your face."

It is the testimony of Martha Wolters that she and her husband never received a real estate first mortgage for \$1500.00, which she and her husband paid for; but that they received interest at the rate of ten per cent per annum up until July 1, 1922. Neither of the defendants, Stelk and Kranzow, took the stand. Both are attorneys-at-law, and each represented himself as attorney in the trial of the case.

To reverse the judgment, the defendants make three

and also the money due.

On September 8, 1934, Wells wrote to Mrs.

Wolfe, asking her to send him in duplicate of certain
items in the estate of Joseph Wolfe, as they were
a piece, in order to help him get money for his children.

On September 30, 1934, Wells wrote to Mrs.

Wolfe, "I am in a position where it is no longer possi-
ble for me to write out any more checks for \$1500.00,
or to obtain that much money at one time, under present

circumstances. If you will be patient and allow me

to pay to you, when I have the money, which will be

the first part of October, I will call on you and dis-

cuss the matter, and perhaps some other satisfactory arrange-

ments. If, on the other hand, you choose to carry out

the theory that you have made, you will find that you will

run up against the heavy estates of Illinois, as well as

Illinois, and that you will be stuck with your money in

quite your face."

It is the testimony of Mrs. Wolfe that she

and her husband never received a real estate trust mortgage

for \$1500.00, which she and her husband held for; but that

they received interest at the rate of ten per cent per annum

up until July 1, 1933. After that date, Wells

and known, took the stand. Both the attorney-at-law,

and the witness, stated as follows in the trial of

the case.

To remove the burden, the defendants make three

points: first, that there was a variance between the pleadings and proof; second, that there was no proof of joint liability of the defendants; and third, that there was a misjoinder of plaintiffs.

The statement of claim recites the delivery to Kranzow of \$1500.00 for the purchase of a mortgage; that they, the plaintiffs, received from Kranzow a receipt for \$1500.00; that they entered into a contract with him, which was guaranteed by Stelk; that the defendants did not purchase the mortgage, as agreed, but converted the money to their own use; that they made repeated demands upon the defendants for the money, which was refused.

The affidavit of merits of Stelk denies any knowledge of the \$1500.00 transaction; admits he guaranteed the performance of the contract; denies he converted any money of the plaintiffs to his own use; avers that the transaction between the plaintiffs and the defendants is in the nature of a partnership, which still exists; that he was not legally liable until the plaintiffs proved that six months written notice had been given to Kranzow; avers that the plaintiffs received 10% on \$1500.00, up to and including June 30, 1932, and received, in all, \$337.50, and sets up and claims the benefit of the Statute on usury.

The affidavit of merits of Kranzow avers that he had no recollection that the plaintiffs paid to him \$1500.00 on April 14, 1930, to be used for the purchase of a real estate mortgage; that he has no recollection

plaintiff, that there was a contract between the
plaintiff and the defendant, and that the
joint liability of the defendant; and that there
was a statement of plaintiff.

The statement of plaintiff to the defendant is
in the amount of \$100.00 for the purchase of a house; and
they, the plaintiff, received from the defendant a receipt for
\$100.00; that they entered into a contract with him, which
was guaranteed by stock; that the defendant did not purchase
the mortgage, as agreed, but converted the money to their
own use; that they were not to be paid back the money
until the money was repaid.

The affidavit of the plaintiff states that
any knowledge of the \$100.00 transaction; that he
guaranteed the performance of the contract; that he
converted any money of the plaintiff to his own use;
avows that the transaction between the plaintiff and
the defendant is in the nature of a partnership, which
will exist; that he was not legally liable until the
plaintiff proved that six months written notice had been
given to him; avows that the plaintiff received 100
on \$100.00, up to and including June 30, 1903, and
received, in all, \$337.50, and sets up and claims the
benefit of the statute on money.

The affidavit of the plaintiff of the defendant states that
he has no recollection that the plaintiff paid to him
\$100.00 on April 14, 1900, so he need not the purchase
of a real estate mortgage; that he has no recollection

that he gave the plaintiffs a receipt for \$1500.00; that all the transactions in regard to the \$1500.00 claimed by the plaintiffs were entered into by the co-defendant, John Stelk; that the plaintiffs knew when they accepted the writing that he, Kransow, signed it as a general partner with his co-defendant, and for the purpose of assisting the plaintiffs in carrying out the investment of their money at a high rate of interest, and he never agreed to purchase a real estate mortgage and deliver it to them; that he never made any other agreement than the one that was offered in evidence; that no money of the plaintiffs ever came into his possession or under his control; that the arrangement between the plaintiffs and the defendants is in the nature of a partnership between the plaintiffs and the two defendants, and many others; that the partnership still exists; that the money of the plaintiffs is safely invested in real estate; that an effort is being made to sell the real estate, so that the plaintiffs and others can be paid; that the plaintiffs have never given him six months written notice of their desire to withdraw their money; that the plaintiffs received an accepted interest at the rate of ten per cent per annum from John Stelk upon the \$1500.00 up to and including June 30, 1922; said interest being in the sum of \$337.50. The affidavit of merits also sets up the Statute of the State of Illinois on Usury.

Considering the allegations of the pleadings,

that he gave the plaintiffs a check for \$2000.00
that all the transactions in regard to the \$1800.00
claimed by the plaintiffs were entered into by the
co-defendant, John Stein; that the plaintiffs knew
and they admitted that during that time, that
it was a general partner with the co-defendant, and for
the purpose of assisting the plaintiffs in carrying out
the investment of their money at a high rate of interest,
and he never agreed to purchase a real estate mortgage
and deliver it to them; that he never made any other
agreement than the one that was offered in evidence; that
no money of the plaintiffs ever came into his possession
or under his control; that the arrangement between the
plaintiffs and the defendants is in the nature of a
partnership between the plaintiffs and the two defendants,
and many others; that the partnership still exists; that
the money of the plaintiffs is solely invested in real
estate; that an effort is being made to sell the real
estate, so that the plaintiffs and others may be paid;
that the plaintiffs have never given him six months
written notice of their desire to withdraw their money;
that the plaintiffs received an account statement of the
rate of ten per cent per annum from John Stein when the
\$1800.00 was so and including June 30, 1903; said interest
being in the sum of \$285.00. The affidavit of merit
also sets up the Statute of the State of Illinois on

we think it is obvious that there was no substantial variance between them and the proof. Considering the receipt of April 14, 1920, and the letter of the defendant Kranzow of May 12, 1920, and the later letters of the defendant Stelk, it is obvious that John and Martha Wolters paid \$1500.00 for the purchase of a real estate first mortgage, which the plaintiffs never received. It is true, that afterwards, on May 29, 1920, Kranzow, sent "an investment agreement" to Martha Wolters, which was subsequently signed by her husband, and not signed by her. It is alleged in the statement of claim that the defendants did not purchase the mortgage, as agreed, but converted the \$1500.00 to their own use. In our judgment, the allegations of the statement of claim and the proof justify the verdict of the jury; either on the theory that the defendants were liable for money had and received, owing to their failure to deliver to the plaintiffs a first real estate mortgage; or on the theory that if the alleged contract, dated April 14, 1920, and sent to Martha Wolters on May 20, 1920, and which was subsequently signed by John Wolters but not by Martha Wolters, became binding on both the plaintiffs. If the contract of April 14, 1920, be considered as binding, it must be considered, bearing in mind the letter of Kranzow of May 29, and the various letters of Stelk, as an agreement on the part of both of them, and not as an agreement signed only by Kranzow and by Stelk as guarantor. Kranzow, in his letter of May 29, states that it was signed by Stelk and himself, and Stelk, in his letters, over and over again, admits that he was personally liable.

no issue is in dispute that there was no substantial
evidence in favor of the plaintiff. In the absence of
evidence of April 14, 1900, and the letter of the plaintiff
and Knapp on May 15, 1900, and the letter of the plaintiff
dated April 14, 1900, it is evident that there was no
evidence in favor of the plaintiff of a real estate time
mortgage, which the plaintiff never received. It is true,
that afterwards, on May 20, 1900, Knapp, sent an invest-
ment agreement to Martha Holter, which was subsequently
signed by her husband, and not signed by her. It is alleged
in the statement of claim that the defendant did not
receive the mortgage, as stated, but received the \$1000.00
in their own way. In our judgment, the allegations of
the statement of claim and the facts justify the verdict
of the jury, which is the basis for the defendant's
liability for money had and received, owing to their failure
to deliver to the plaintiff a first real estate mortgage;
or on the theory that if the alleged contract, dated April
14, 1900, and sent to Martha Holter on May 20, 1900, and
which was subsequently signed by John Holter but not by
Martha Holter, became binding on both the plaintiff.
If the contract of April 14, 1900, be considered as bind-
ing, it must be considered, bearing in mind the letter
of Knapp of May 20, and the various letters of Holter, as
an agreement on the part of both of them, and not as an
agreement signed only by Knapp and by Holter as guarantor.
Knapp, in his letter of May 20, states that it was signed
by Holter and himself, and Holter, in his letter, over and
over again, admits that he was personally liable.

Both the defendants set up in their affidavits of merits that the transaction was in the nature of the partnership between the plaintiffs and both the defendants, and others. That means that both Stelk and Kranzow interpret their relations with the plaintiffs as principals, that is, that Stelk was not merely a guarantor, but a principal, the same as Kranzow, and that both were liable equally.

As to the provision in the contract that the money would be returned with interest, provided six months written notice was given, that was obviously satisfied by the writings of Martha Wolters, in which it is admitted by Stelk, that over and over again she demanded her money. If he and Kranzow were, as both have stated in their affidavits of merits, partners, six months notice to one would be equivalent to six months notice to the other.

It is very significant that neither of the defendants testified. It is very difficult to review the testimony in the case, together with the letters of Kranzow and Stelk, without reaching the conclusion that the defendants were undertaking to overreach the plaintiffs.

We do not think that there was any misjoinder of the plaintiffs, nor misjoinder of the defendants.

Considering the pleadings and the evidence, we do not feel justified in overriding the verdict of the jury.

The judgment, therefore, will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

Both the defendants set up in their affidavits of
defense that the transaction was in the nature of a present-
ment for the benefit of the defendant, and
that it was not a loan. That seems that both Gault and Korman interpreted
their relations with the plaintiff as principal, and is,
that Gault was not merely a guarantor, but a principal, the
same as Korman, and that both were liable equally.

As to the provision in the contract that the money
would be returned with interest, provided six months written
notice was given, that was obviously satisfied by the writ-
ing of such notice, in which it is admitted by Gault,
that over and over again she demanded her money. If he and
Korman were, as both have stated in their affidavits of
defense, guarantors, six months notice to one would be suffi-
cient to give notice to the other.

It is very significant that neither of the
defendants testified. It is very difficult to review the
testimony in the case, together with the facts of Korman
and Gault, without reaching the conclusion that the defen-
dants were undertaking to overreach the plaintiff.

We do not think that there was any misjoinder
of the plaintiff, nor misjoinder of the defendants.
Considering the pleadings and the evidence, we
do not feel justified in overruling the verdict of the
jury.

The judgment, therefore, will be affirmed.

339 - 31471

GREENEBAUM SONS BANK & TRUST
COMPANY,

Appellee,

v.

BERT G. COCHRANE,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On April 26, 1926, Greenebaum Sons Bank & Trust Company, plaintiff, filed in the Municipal Court a statement of claim and cognovit for money due upon two notes, one for \$200.00, dated July 8, 1918, and one for \$500.00 dated September 3, 1918, payable, respectively, 90 and 91 days after date, to the Howe Manufacturing Company, both of which were endorsed and delivered for a valuable consideration, and before maturity, to the plaintiff; and obtained judgment in the sum of \$1,082.78, being the amount of principal, interest and \$70.00 attorney's fees.

On May 5, 1926, the defendant filed an affidavit, and moved to vacate the judgment, and be allowed to appear and defend, the judgment meanwhile to stand as security. The motion was allowed. There was a trial before the court with a jury; and at the close of all the evidence, the trial judge instructed the jury to find for the plaintiff. There was, accordingly, a verdict for the plaintiff in the sum of \$1,082.78, and judgment was entered thereon. This appeal is from that judgment.

GRANITEWORKS HOME MARK & TRUST
COMPANY,
Appellant,
vs.
JAMES A. WILSON,
Appellee.

Opinion filed Oct. 19, 1937.

MR. JUSTICE LUTHER TAYLOR delivered the

opinion of the court.

On April 26, 1936, Graniteworks Home Mark & Trust Company, Plaintiff, filed in the Municipal Court a statement of claim and account for money due upon two notes, one for \$200.00, dated July 8, 1918, and one for \$200.00 dated December 8, 1918, payable, respectively, to the order of the plaintiff, to the Home Manufacturing Company, both of which were endorsed and delivered for a valuable consideration, and before maturity, to the plaintiff; and obtained judgment in the sum of \$1,008.76, being the amount of principal, interest and \$70.00 attorney's fees.

At the trial, the defendant filed an affidavit and moved to vacate the judgment and be allowed to appear and defend, the judgment was set aside and a new trial was ordered. There was a trial before the court with a jury and at the close of all the evidence, the trial judge instructed the jury to find for the plaintiff. There was, accordingly, a verdict for the plaintiff in the sum of \$1,008.76, and judgment was entered thereon. This appeal is from said judgment.

At the trial, the plaintiff introduced in evidence the two notes, above mentioned, and rested. The defense consisted of the testimony of the defendant himself; that of one Bessey, an officer of the Howe Mfg. Company, and an offer to prove certain facts by the defendant Bessey, and one Cochrane, which offer was refused by the trial judge.

The evidence of the defendant, and that of Bessey, which was permitted to be put in, shows, substantially, the following:- In 1917 the defendant was a salesman for the Howe Mfg. Co. He remained in that position until the company, in the latter part of October 1918, went into bankruptcy. He then went into business for himself. Bessey was connected with the Howe Mfg. Co. till it went into bankruptcy. The Howe Mfg. Co. did its banking business with the plaintiff, Greenbaum Sons Bank & Trust Company, and had been doing so for two years. The Howe Mfg. Co. sold some of its stock to some of its employees, one of whom was the defendant. For stock, it sold the defendant it received from him two notes, one for \$500.00, and one for \$250.00. A few days after the notes were signed, Bessey took them, the two originals - the two here in suit being renewals - to Greenbaum, president of the plaintiff, and discounted them. Of this, the defendant had notice. The original note for \$500.00 was dated December 8, 1917, was due June 7, 1918, and was discounted December 10, 1917, and the \$250.00 note was dated December 8, 1917, due April 7, 1918, and discounted on December 10, 1917.

As stated, other evidence was offered for the defendant but was ruled out as incompetent.

At the trial, the plaintiff introduced in evidence the two notes, above mentioned, and testified that the same were obtained by the defendant from the defendant's office, an officer of the Home Life Company, and an officer to prove certain facts by the defendant's company, which officer was retained by the trial judge, and one Greenbaum, which officer was retained by the trial judge.

The evidence of the defendant, and that of Greenbaum, which was permitted to be put in, above, substantially, the following:- In 1917 the defendant was a salesman for the Home Life Co. He remained in that position until the summer, in the latter part of October 1918, when he was discharged. He then went back to his old position, Greenbaum, as the plaintiff, Greenbaum, some time in 1917, and had been doing so for two years. The Home Life Co. sold some of its stock to some of its employees, one of whom was the defendant. For stock, it sold the defendant a note for \$100.00, and one for \$200.00, and one for \$300.00. A few days after the notes were signed, Greenbaum took them, the two originals - the two here in suit being copies - to Greenbaum, president of the plaintiff, and accounted them. Of this, the defendant had notice. The original note for \$100.00 was dated December 5, 1917, and due June 7, 1918, and was discounted December 10, 1917, and the \$200.00 note was dated December 5, 1917, and April 7, 1918, and accounted on December 10, 1917.

As stated, other evidence was offered for the defendant but was ruled out as incompetent.

The chief question in the case is whether the trial judge erred in refusing to permit the defendant to put in evidence tending to show the following: that, on December 8 or 10, 1917, when the original notes were discounted, Bessey had a conversation with the President of the plaintiff in which he told the latter that an arrangement had been made between the Howe Mfg. Co. and the defendant to sell the defendant certain shares of stock of the company, of the par value of \$750.00 and that the two notes had been given in payment therefor, and that under the arrangement the defendant was to pay his notes at the rate of \$12.50 per week out of the salary to be earned by him as an employe of the company; that in the course of the conversation, the President of the plaintiff, stated, substantially, that he was perfectly satisfied to permit that; thereupon the notes were discounted by the plaintiff, and the proceeds of the notes credited by it to the account of the Howe Mfg. Co.; that the defendant made payment to the company of \$12.50 a week, from December 8, 1917, the date of the notes, until the latter part of October, 1918, when the Howe Mfg. Company went into bankruptcy; that, as a result, credit should be given the defendant for \$12.50 a week from December 8, 1917 to October 15 or 24, 1918; that the defendant gave to the Howe Mfg. Co., new notes in renewal of the original notes; and upon the maturity of those renewals, gave, at the request of Bessey of the Howe Mfg. Company, two other notes as renewals - being the notes sued upon - that no other consideration was given for any of the renewal notes than was given for the two original ones, save the return of the matured unpaid notes; that the defendant never received from

The chief question in the case is whether the
trial judge erred in refusing to permit the defendant to
put in evidence tending to show the following: that, on
December 8 or 10, 1917, when the original notes were dis-
counted, Henry had a conversation with the President of
the plaintiff in which he told the latter that an arrangement
had been made between the Howe Mfg. Co. and the defendant
to sell the defendant certain shares of stock of the company,
of the par value of \$750.00 and that the two notes had been
given in payment therefor, and that under the arrangement the
defendant was to pay his notes at the rate of \$12.50 per
week out of the salary to be earned by him as an employee of
the company; that in the course of the conversation, the
President of the plaintiff, stated, substantially, that he
was perfectly willing to permit that; whereupon the notes
were discounted by the plaintiff, and the proceeds of the
notes credited by it to the account of the Howe Mfg. Co.;
that the defendant made payment to the company of \$12.50
a week, from December 8, 1917, the date of the notes, until
the latter part of October, 1918, when the Howe Mfg. Company
went into bankruptcy; that as a result, credit should be
given the defendant for \$17.50 a week from December 8, 1917
to October 15 or 24, 1918; that the defendant gave to the
Howe Mfg. Co., new notes in renewal of the original notes;
and upon the maturity of those renewals, gave, at the re-
quest of Henry of the Howe Mfg. Company, two other notes
as renewals - being the notes used upon - that no other con-
sideration was given for any of the renewal notes than was
given for the two original ones, save the return of the
maturity unpaid notes; that the defendant never received from

Howe Mfg. Company any part of the stock for which the notes were given; that several times between December, 1917 and October, 1918, the financial condition of the Howe Mfg. Company, its debt to the plaintiff, and the notes in question were discussed between Greenebaum and Bessy of the Howe Mfg. Company.

The trial judge in sustaining the plaintiff's objection to the proffered evidence, ruled that payments by the defendant to the Howe Mfg. Company, after the assignment of the notes to the plaintiff, and after notice to the defendant of the assignment, were not payments as far as the plaintiff's rights were concerned, and could not be shown as a defense to a suit on the notes by the plaintiff, even though the plaintiff had notice of the understanding that existed between the defendant and the Howe Mfg. Company.

Being of the opinion that there is no evidence, and no offer of evidence tending to show that when the notes sued upon - being renewals, dated respectively, July 8 and September 3, 1918 - were given, any agreement was made or understanding had that the defendant was to pay them, the renewal notes, in sums of \$12.50 per week, to be taken out of his salary to be earned by him as an employe of the Howe Mfg. Company, we are of the opinion that the trial judge properly excluded the proffered evidence, and instructed the jury in the plaintiff's favor.

There is no evidence, or offer to prove that the alleged agreement that the notes should be paid by the

that the Company did not at the time for which the notes were given that certain class between December, 1917 and October, 1918, the financial condition of the home of the Company, its debt to the plaintiff, and the notes in question were discussed between Greenbaum and Messer of the same City Company.

The trial judge in sustaining the plaintiff's objection to the proffered evidence, ruled that payment by the defendant to the Home City Company, after the receipt of the notes to the plaintiff, and after notice to the defendant of the plaintiff's claim, was not binding on the plaintiff's rights were concerned, and would not be shown as a defense to a suit on the notes by the plaintiff, even though the plaintiff had notice of the defendant's claim related between the defendant and the Home City Company.

Being of the opinion that there is no evidence, and no offer of evidence tending to show that when the notes were given - being renewable, dated respectively July 8 and September 5, 1918 - were given, any agreement was made or understanding had that the defendant was to pay them, the renewal notes, in sum of \$18,50 per week, to be taken out of his salary to be earned by him as an employee of the Home City Company, we are of the opinion that the trial judge properly excluded the proffered evidence, and instructed the jury in the plaintiff's favor.

There is no evidence, or offer to prove that the alleged agreement that the notes should be paid by the

defendant in weekly sums out of his salary, was part of the contract of indebtedness represented by either the first renewal or the second; and even if there were, there is no proof or offer to prove that the plaintiff had any knowledge of it, or consented to it, when it surrendered the original or the first renewal notes. Evidence of what took place when the original notes were given is not necessarily evidence that similar things took place when the first renewals were given, and when also the second renewals, the ones sued on, were given. There is no claim that the plaintiff received back the money which it paid the Howe Mfg. Company. When the original notes fell due, the plaintiff, instead of suing, entered into new contractual relations with the defendant by taking new notes. The old notes and the old relations of which they were evidence, as far as the proof or offer to prove shows, ^{were} extinguished; and a similar transmutation took place when the second set of renewals, the ones here sued on, were given. In Mumford v. Tolman, 157 Ill. 356, where the status of a renewal note as compared with that of an original was considered, the court said,

"the affidavit does not show that the alleged agreement was continued in force by the parties upon the renewal of the note. For anything appearing in the affidavit that agreement had ceased to be available as a defense to a note, by limitation, long before the judgment by confession was entered."

The defendant offered to show that the Howe Mfg. Company deducted \$12.50 weekly from his salary from December 2, 1917, until the latter part of October 1918, when the company went into bankruptcy, that those amounts totalled, approximately, \$500.00; but as the renewal notes

defendant in weekly sums out of his salary, was part of the contract of indebtedness represented by either the first renewal of the promissory note or the second, when it was given or after he gave that the plaintiff had any knowledge at it, or intended to it, then it constituted the original or the first renewal note. Evidence of what took place when the original notes were given is not necessarily evidence that similar things took place when the first renewal note was given, and when also the second renewal, the ones used on, were given. There is no claim that the plaintiff received back the money which it paid the New York Company. When the original notes fell due, the plaintiff, instead of suing, entered into new confidential relations with the defendant by taking new notes. The old notes and the old relations of which they were evidence, as far as the proof or offer to prove above ^{were} extinguished; and a similar transaction took place when the second set of renewals, the ones here used on, were given. In Harford v. Tolson, 157 Ill. 322, where the status of a renewal note as compared with that of an original was considered, the court said:

"The plaintiff does not show that the alleged agreement was continued in force by the parties upon the payment of the note. For anything appearing in the plaintiff's agreement had ceased to be evidence as a matter of course by limitation, long before the payment of the note was received."

The defendant offered to show that the New York Company deducted \$12.50 weekly from his salary from December 2, 1917, until the latter part of October 1918, when the company went into bankruptcy, that those amounts collected, approximately, \$500.00; but as the renewal notes

here sued upon were given in July and September, 1918, respectively, and as it is admitted the defendant knew that the notes had been discounted by, and assigned to the plaintiff, it follows that when he renewed them, practically for the full amount, he knew, or with ordinary care would have known, that the plaintiff had not received payment from the Howe Mfg. Company, and so by the execution of the renewal notes he must be charged with having waived any such defense he might have had to the originals. He who renews a note, with knowledge of a certain defense to the original, or with such knowledge that he could discover it upon reasonable investigation, or with ordinary diligence, and at the time of renewal makes no claim for it, is chargeable with having waived it. Western Silo Co. v. Pruitt, 221 Pac. 106; Bank of Union v. Hungerford, 239 Pac. 352; Farmers & Merchants' Savings Bank v. Jones, 196 N.W. 57; First Nat. Bank of Pittsburgh v. Dowling, 133 Atl. 723. Franklin Phos. Co. v. International Harvester Co., 62 Fla. 185; American Natl. Bank v. Hill, 105 N.C. 235; Thorpe v. Cooley, 138 Minn. 431; Haglin v. Friedman, 118 Ark. 465.

The defendant offered to prove that he did not receive any of the stock of the Howe Mfg. Company for which his notes were given; but that it was inadmissible for two reasons; first, it was not pleaded, and, second, the plaintiff admittedly discounted the notes for value before maturity and without knowledge of a possible failure of consideration as between the company and the defendant. As to the payment of approximately \$500.00 to the Howe Mfg. Company

time when they were given in 1917 and September, 1918,
respectively, and as it is admitted the defendant knew
that the notes had been introduced by, and assigned to
the plaintiff, it follows that when he received them,

presumably for the full amount, he knew, or with
ordinary care would have known, that the plaintiff had

not received payment from the Howe Mfg. Company, and

as to the assignment of the several notes he was in contact
with having advised only such persons as might have had so
the original. He who receives a note, with knowledge of
a certain defect in the original, or with such knowledge
that he could discover it upon reasonable investigation,

or with ordinary diligence, and at the time of receipt
makes no claim for it, is chargeable with having advised

1. Howe Mfg. Co. v. Smith, 100 Me. 101, 102 Me. 101.

Smith v. Howland, 100 Me. 101, 102 Me. 101; Smith v. Howland, 100 Me. 101, 102 Me. 101.

Howe v. Smith, 100 Me. 101, 102 Me. 101; Smith v. Howland, 100 Me. 101, 102 Me. 101.

Howe v. Smith, 100 Me. 101, 102 Me. 101; Smith v. Howland, 100 Me. 101, 102 Me. 101.

Howe v. Smith, 100 Me. 101, 102 Me. 101; Smith v. Howland, 100 Me. 101, 102 Me. 101.

Howe v. Smith, 100 Me. 101, 102 Me. 101; Smith v. Howland, 100 Me. 101, 102 Me. 101.

Howe v. Smith, 100 Me. 101, 102 Me. 101; Smith v. Howland, 100 Me. 101, 102 Me. 101.

The defendant offered to prove that he did not

twenty not at the date of the first note. The jury for which
his notes were given; but that it was inadmissible for

two reasons; first, it was not pleaded, and, second, the

plaintiff admittedly discounted the notes for value before

actually and without knowledge of a possible failure of com-

pletion as between the company and the defendant. As to

the payment of approximately \$1000.00 by the first note, the

before he executed the renewal notes sued upon, that he paid at his own risk, as the court said in Keohane v. Smith, 97 Ill. 156.

"He knew his note was outstanding, and if he paid it to a party, not the holder, it was at his own risk as to whether such party would apply the money in payment of his outstanding note."

King v. Heilig, et al, 203 Ill. App. 117; Bailey v. Walters, 202 Ill. App. 422.

In the instant case, no offer was made by the defendant to prove that at the time of the execution of final renewals, the plaintiff knew that the defendant had paid approximately \$500.00 to the Howe Mfg. Company.

Without deciding, therefore, whether evidence tending to show that the plaintiff knew of the oral agreement between the defendant and the Howe Mfg. Company was admissible, we hold that even if such evidence were competent and had been introduced, there is neither allegation nor proof that such an agreement was made a part of the contract when the renewal notes, sued upon, were executed and delivered, or, if made, as between the defendant and the Howe Mfg. Company, that the plaintiff knew of it.

The judgment, therefore, will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

before he executed the various notes and upon, that he
held at his own risk, as the court said in Robinson v. Smith,
97 Ill. 186.

"The Xmas his note was outstanding, and it is said
it is a party, and the holder, it was at the time
that he was holding and would only the money
is subject of his outstanding note."

Robinson v. Smith, 97 Ill. 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In the instant case, no offer was made by the
defendant to prove that at the time of the execution of
these notes, the plaintiff knew that the defendant was
paid approximately \$100.00 to the New Mfg. Company.

Without deciding, therefore, whether evidence tend-
ing to show that the plaintiff knew of the oral agreement
between the defendant and the New Mfg. Company was admissible,
we hold that even if such evidence were competent and had been
introduced, there is neither direct nor indirect evidence
an agreement was made a part of the contract when the renewal
notes, such upon, were executed and delivered, or, if made,
as between the defendant and the New Mfg. Company, that
the plaintiff knew of it.

The judgment, therefore, will be affirmed.

THE COURT.

WILLIAM A. KILPATRICK, J. C. KILPATRICK.

377 - 31508

GURDON WILLIAMS,

Appellee,

v.

EVERETT G. BALLARD,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On December 10, 1925, Gurdon Williams, the plaintiff brought suit in the Municipal Court against Everett G. Ballard on a promissory note, executed and delivered by the defendant to the order of DuBois and endorsed by him and delivered by DuBois to the plaintiff. There was a trial before the court with a jury, and a verdict and judgment for the plaintiff. This appeal is from that judgment.

At the trial the plaintiff testified and introduced the note in evidence. The note shows that it is for \$700.00, and was dated October 5, 1925; and payable 60 days after date to the order of C. D. DuBois and that it was signed by Everett G. Ballard, as maker. It bears the endorsement, "October 31, 1925, Received on the within note \$50.00 C. D. DuBois, C. D. DuBois."

The evidence of the plaintiff is substantially as follows: He is an attorney at law, with offices at

NOT - 1937

UNKNOWN WILLING
Appellee
THOMAS J. HALL
Appellant

Opinion filed Oct. 19, 1937.

THE COURT: JUSTICE TAYLOR DELIVERED

the opinion of the court.

On December 12, 1937, THOMAS J. HALL, the
plaintiff, brought suit in the Circuit Court against
Eugene A. Hall on a promissory note, executed and
delivered by the defendant to the order of Eugene A.
Hall and delivered by Eugene A. Hall to the plain-
tiff. There was a verbal contract for the note with a copy
and a verified and judgment for the plaintiff. This appeal
is from that judgment.

At the trial the plaintiff testified and intro-
duced the note in evidence. The note shows that it is
for \$700.00, and was dated October 2, 1937, and payable
to the order of E. A. Hall and that
it was signed by Eugene A. Hall, as maker. It bears
the endorsement, "December 21, 1937, received on the
within note \$700.00 E. A. Hall, C. E. Hall."

The evidence of the plaintiff is substantially
as follows: He is an attorney at law, with offices at

160 North LaSalle Street. The note came into his hands, on November 13, 1925, by purchase, and has remained in his possession ever since. Nothing has been paid thereon. On cross-examination, he stated that he purchased it from DuBois, who owed him \$360.00 for an attorney's fee for legal services in the case of the People v. DuBois, et al, an action in the Municipal Court under the Blue Sky law, and for \$110.00 for money loaned, part of it being \$50.00 which he gave DuBois on November 13, 1925, making a total debt of \$460.00; that he had the note sometime before November 13, in order to investigate Ballard, the maker, and decide whether he would take it; that Ballard was a man with apparently large interests but had difficulty in raising money; that he gave it back shortly after its date, before the \$50.00 was endorsed on it; that on November 13, DuBois brought it back, after the plaintiff had rejected it; and said he was very hard up and that Ballard had certain interests in Indiana; that he, the plaintiff, then "took a chance", gave DuBois \$50.00 more, and told him he would accept it in discharge of his, DuBois' indebtedness; that he, the plaintiff, put it in an envelope and then in a steel cabinet in his safe; that on December 5, 1925, the day after it came due he wrote to Ballard stating that "the balance covered by this note fell due yesterday, the 4th of December"; that at the time he wrote the letter he had the note before him; that before it fell due he tried to reach Ballard and have a talk with him.

1935 North Atlantic Street. The note came into his hands
on November 12, 1935, by purchase, and has remained in
his possession ever since. Nothing has been said thereon.
In re-examination, he stated that he purchased it
from Nichols, who owed him \$350.00 for an attorney's
fee for legal services in the case of the People v.
Nichols, et al, an action in the Municipal Court under the
New York law, and for \$10.00 for money loaned, part
of it being \$50.00 which he gave Nichols on November 12,
1935, making a total debt of \$450.00; that he had the
note sometime before November 12, in order to invest-
igate Nichols, the matter, and decide whether he would
take it; that Nichols was a man with apparently large
interests but had difficulty in raising money; that he
gave it back shortly after the date, before the \$50.00
was endorsed on it; that on November 12, Nichols brought
it back, after the plaintiff had refused it; and said
he was very hard up and that Nichols had certain interests
in Indiana; that he, the plaintiff, then "took a chance",
gave Nichols \$50.00 more, and told him he would accept
it in discharge of his, Nichols', indebtedness; that he,
the plaintiff, put it in an envelope and then in a steel
cabinet in his safe; that on December 2, 1935, the day
after it was taken to where he believed it was
"the balance covered by this note will be yesterday",
the 2nd of December; that at the time he wrote the
letter he had the note before him; that before it fell
into his hands he had to reach Nichols and have a talk with him.

The evidence of Ballard is to the following effect; that the note was given to him on the date it bears as a renewal of another note; that he last saw the note prior to the time of the trial, in his own office on December 5, 1925, at which time DuBois asked him to renew it and get ready to pay it within two months; that at that time DuBois claimed to own the note and had it in his possession; that about five weeks after December 5, he saw DuBois and DuBois asked him what he was going to do about the note; that he, Ballard, said, "Do you still own that note," "I thought Mr. Williams owned that note; he has brought suit on it"; that DuBois said "Why, of course, I own it;" that he, Ballard, then said, "Well, we will have to wait until we get to court to find out about that matter."

One Dearbeyne, for the defendant testified that he had a talk with DuBois in January, 1926; that DuBois told him that he was suing Ballard on the note, because Ballard said he would not renew it or pay him something on account. That some time later he talked with DuBois about money he owed Ballard, but that DuBois said that was not owed by him personally but jointly with a man named Roy; that several days later he, Dearbeyne, saw DuBois and told him Ballard would give him a certain release, if he, DuBois, would pay the difference; that DuBois said it was too late, too far gone. He further testified that he asked DuBois if he had an attorney and DuBois said he had Mr. Williams; that he was suing Ballard on the note and that Williams was representing him.

The evidence of Salinas is to the following effect: that the note was given to him on the date it bears as a renewal of another note; that he later saw the note prior to the time of the trial, in his own office on November 2, 1937, at which time Nichols asked him to renew it and was ready to pay it within two weeks. That at that time Nichols showed to him the note and had it in his possession; that about five weeks after December 2, he saw Nichols and Nichols asked him what he was going to do about the note; that he, Salinas, said, "as you still owe that money," "I thought so, Williams" asked that note; he then brought out an 11; that Nichols said "Well, of course, I own it," that he, Salinas, then said "Well, we will have to wait until we pay the money to find out about that matter."

One Bartholomew, for the defendant testified that he had a talk with Nichols in January, 1938; that Nichols told him that he was owing Williams on the note, because Salinas said he would not renew it or pay him something on account. That some time later he talked with Nichols about money he owed Salinas, but that Nichols said that was not owed by him personally but jointly with a man named Hoy; that several days later he, Bartholomew, saw Nichols and told him Salinas would give him a certain release, if he, Bartholomew, would pay the difference; that Nichols said it was too late, too far gone. He further testified that he asked Nichols if he had an attorney and Nichols said he had Mr. Williams; that he was owing Williams on the note and that Williams was representing him.

In the brief for the defendant five points are made; all to the effect that the verdict is against the manifest weight of the evidence. There is no doubt but that the plaintiff, by the introduction of the note and his own testimony, made out a prima facie case; and that the burden of introducing sufficient evidence to show the contrary, was then upon the defendant. Does the evidence for the defendant accomplish that purpose? The verdict of the jury answers that question in the negative. It follows, therefore, that unless the record here shows such discrepancies and inconsistencies, and is in such a condition, as to cast grave doubts upon the truth of the plaintiff's evidence, the judgment must stand. An analysis of all the evidence, however, as it appears here in the record, does not show sufficient to convince this court that the jury erred. Of course, they saw the witnesses and we do not. On the subject of credibility, and that is the all important matter, they were far better situated than we are. If they believed the plaintiff, and evidently they did, we do not feel justified, from the record before us, in holding that they were wrong.

A number of rulings made by the trial judge are charged as constituting sufficient reason for a reversal of the judgment. We do not find, however, that among the five points in defendant's brief that any involves that subject; and, so, under the rules of this court, such rulings are not here, necessarily, to be considered.

in the price for the defendant five points
the weight of the evidence. There is no doubt
that the defendant, in the investigation of the case
and his own testimony, made out a strong case; and
that the burden of establishing the facts was on
the country, was then upon the defendant. From the
evidence for the defendant (and the jury) the
verdict of the jury answers that question in the negative.
It follows, therefore, that unless the record here shows
such discrepancies and inconsistencies, and is in such
a condition, as to cast grave doubts upon the truth of
the plaintiff's evidence, the judgment must stand. In
analysis of all the evidence, however, as it appears here
in the record, does not show sufficient to convince this
court that the jury erred. Of course, they saw the wit-
nesses and we do not. On the subject of credibility, and
that in the all important matter, they were the better
qualified than we are. If they believed the plaintiff,
and evidently they did, we do not feel justified, from
the record before us, in holding that they were wrong.
A number of rulings made by the trial judge
are thought as materially affecting the result
of the judgment. We do not find, however, that among the
five points in defendant's brief that any involve the
subject; and, we, under the rule of this court, such
rulings are not materially, to be considered.

But we have considered them, and do not find any of such importance as to justify a reversal.

For the reasons given the judgment will be affirmed.

AFFIRMED.

HOLDEN and WILSON, JJ. CONCUR.

But we have ourselves seen, and we have seen it all.

Therefore we are perfectly satisfied.

The first sentence of the judgment will be

affirmed.

The second sentence of the judgment will be

affirmed.

The third sentence of the judgment will be

affirmed.

The fourth sentence of the judgment will be

affirmed.

The fifth sentence of the judgment will be

affirmed.

The sixth sentence of the judgment will be

affirmed.

The seventh sentence of the judgment will be

affirmed.

The eighth sentence of the judgment will be

affirmed.

The ninth sentence of the judgment will be

affirmed.

The tenth sentence of the judgment will be

affirmed.

The eleventh sentence of the judgment will be

affirmed.

The twelfth sentence of the judgment will be

affirmed.

WILLIAM G. STRONG,

Appellee,

vs.

W. H. SCHENDORF,

Appellant.

APPEAL from
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On September 21, 1925, William G. Strong, the plaintiff, brought suit in the Municipal Court on a promissory note for \$250.00, executed and delivered by W. H. Schendorf, the defendant, and, upon a trial before the court, with a jury, recovered a verdict and judgment in the sum of \$370.00. This appeal is therefrom.

The evidence for the plaintiff consisted of the note, which was introduced, and the testimony of the plaintiff. He was originally called by the defendant under section 33, and afterwards testified for himself. His evidence is to the following effect: - He is a lawyer, and practiced his profession in Waukegan for over thirty years. Sometime in 1918, the defendant, who was 22 to 23 years old, together with his mother, Mrs. Schendorf, came to his office and asked him if he would defend them in a foreclosure suit involving their farm in Lake County, and he consented to do so. He was then engaged. Accordingly, a few weeks afterwards, he entered his appearance in the case, which was entitled Central

Trust Co. v. W. M. Schendorf, et al; and, also, on March 1, 1918, filed a demurrer, and, later, an answer. The defendant here, W. M. Schendorf, was not personally a party to the foreclosure proceedings. When the plaintiff was asked by counsel for the defendant if he ever gave the defendant anything of value, he answered, "I gave him services which he promised to pay for. I gave him legal services," and on motion for the defendant the court struck out the words "which he promised to pay." Although while testifying when called by the defendant, he stated that at the first meeting when the defendant and his mother were present, the subject of paying the plaintiff for his services was talked over, and the defendant said he would be paid; when testifying for himself, in rebuttal, he stated that he was not sure that at that conversation anything was said about payment for services. In evidence in rebuttal he stated, that in his office, shortly after March, 1918, he asked the defendant when he could pay the balance due for services; that the defendant replied that at that time he could not do anything but would give his note, if not made payable until one year, as he thought; by that time he could pay something on account; that he would give a note for \$250.00 if made in that way; that then, after the discussion, the note was drawn, payable in one year, with interest at six per cent per annum "after maturity until paid;" that the next time he talked with the defendant was after it was due, when he telephoned and asked him, the defendant, if he could pay something on account of the note; that the defendant

replied that he would as soon as he could, but was not able at that time; that when asked, "Can't you pay something within a week or two," he answered, "I will try;" that he has since had many conversations with the defendant; that he had one some years prior to the trial, in Henrici's Restaurant, in the course of which he asked the defendant if he could not do something on the note and the defendant said he was not in a position to do so then, but would as soon as he could; that on several other occasions the defendant said he would do something as soon as he could; that about a year before the trial he told the defendant that if he did not pay it, he would be forced to sue, and the defendant said, "If you sue on this note, I will never pay you a cent interest or pay the note."

The evidence of the defendant consists chiefly in a denial that he ever promised to pay the plaintiff for any legal services. He testified further, that the farm which was being foreclosed was his mother's, and that he had no interest in it; that at the time he signed the note, he did not say that he would be bound for his mother's solicitor's fees in connection with the foreclosure suit; when asked if, when he signed the note, he had no intention of paying it, he answered, "No, sir, I did that until sometime she could pay it." He further testified, that the plaintiff called him up and asked him to come in and sign the note for him; that he went in and signed it; that the plaintiff told him that so far he had not been paid anything in the matter; that he, the defendant, told him that his mother would pay him when she got something to pay him with; that he had various

conversations with the plaintiff in the course of the last seven to nine years prior to the trial, but did not remember what they were; when recalled, and asked whether he ever said to the plaintiff that he would pay the note, or uttered "words to that effect, or did you say words from which such an inference could be drawn," he answered, "Yes, he might have drawn the inference to this; I said I would clean every debt was against the name of Schendorf at my own convenience and at my own convenience only." Then asked if he ever promised to pay the note, he answered, "Not other than just in the way I have been telling you now."

Obviously, no legal defense was established. When the maker of a note admits he used such language that the payee was justified in inferring therefrom that he, the maker, would pay the note in any event, he cannot escape liability by claiming it was originally given for the accommodation of a third person; the new and further promise is evidence that the infirmity of accommodation is extinguished and that the note is the free, unqualified obligation of the promisor.

Of course, it is not necessary, here, to base the validity of the judgment on that ground alone. Apart from the defendant's admission as to the effect of his conduct in talking over the matter with the plaintiff, there is ample evidence as to justify the verdict that it would be unreasonable for this court of review to override it. On the general merits, it was chiefly a question of credibility. If the jury believed the plaintiff, and evidently they did, what reason is there for us to

doubt him] There are no serious discrepancies or inconsistencies in his testimony. True, it may well be that the defendant was not a party to the foreclosure proceedings; but it was his mother's property, and not unnatural that a son would promise to pay her solicitor's fees. The jury saw the plaintiff and the defendant, and in such a case, where there is affirmation on one side and categorical denial on the other, they are, as far as credibility is concerned, far more advantageously situated than we are. Further, taking the record, alone, as it appears before us, we feel convinced that in all reasonable probability, the jury was right.

In the brief for the defendant, three points are made, all of which, however, involve the same subject matter, that of want of, or failure of consideration. In the argument, certain parts of the instructions are criticized and it is urged that the judgment should be reversed on that account. Under the rules of this court, no point as to errors in instructions having been made, they are not before us for review. However, a consideration of them does not show that there was any such substantial error as would justify a reversal.

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

HOLDEN AND WILSON, J.J. CONCUR.

[illegible][illegible][illegible]

412-31847

GOLF COHEN,

Appellant,

vs.

JOSEPH E. BEST,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On December 3, 1925, Golf Cohen, the plaintiff, bought from Joseph E. Best, the defendant, the property known as 4125 West Van Buren Street, for \$25,500.00. At the time of the purchase neither party knowing what the taxes on the property would be for the year 1926, and both parties being desirous of pro rating them, so that the seller should be charged for the taxes that might be considered as having accrued from January 1, 1925, to December 3, 1925, the time of sale, and that the purchaser should be charged with the taxes that might be considered as having accrued after December 3, 1925, and before January 1, 1926, signed and entered into the following written agreement:

"In connection with the three story apartment building located at 4125 West Van Buren Street, Chicago, Illinois, I acknowledge that Joseph Best has paid to me the sum of Two Hundred sixty dollars (\$260.00), which said sum will remain in my hands until the presentation to me for the above described premises of the 1926 General Tax Bill when issued in 1926.

"I hereby agree with you that Golf Cohen has this day purchased the above described premises from Joseph E. Best for a consideration of Twenty-eight Thousand Five Hundred dollars (\$28,500.00),

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subject to endorsement of record, and in connection with said purchase I agree with you that Joseph West has allowed Wolf Cowen the sum of forty dollars (\$40.00) as his prorata credit of the 1925 General Tax will on said premises, from January 1, 1925, to December 3, 1925. If the 1925 General taxes shall exceed the said prorata portion of \$40.00 I agree to pay Wolf Cowen such excess sum out of the \$200.00 which I held in my possession. If, however, the prorata share will be less than \$40.00, Wolf Cowen is to pay to Irwin Grossman for the benefit of Joseph C. West such prorata difference, and the balance of the \$200.00, if any, remaining in my hands will be delivered to Joseph C. West.

Dated, Chicago, Illinois, December 3, 1925.

(Signed) Irwin Grossman.

Accepted:

(Signed) Wolf Cowen

by E. A. Cowen,

his duly authorized

agent in this behalf.

(Signed) Joseph C. West.

It turned out that the general taxes for the year 1925 amounted to \$711.48, and that the prorata share for the period from January 1, 1925, to December 3, 1925, that would normally be chargeable against the seller, the defendant, would be \$657.90; and the plaintiff having been paid only \$40.00, brought this suit for \$617.90, being \$657.90, less the \$40.00, that he had been paid.

There was a trial before the court, with a jury. The trial judge held that the contract, above set forth, was binding; that testimony in regard to conversations leading up to its execution and what was said afterwards, were inadmissible; and directed the jury to find for the defendant. There was, accordingly, a verdict for the defendant; and judgment was entered thereon. This appeal

is therefrom.

It is the theory of the plaintiff that as the tax bill of 1925 amounted to \$711.48, and the prorata owed on that basis amounted to \$357.50, and he had received only a credit of \$40.00, there was still due him \$317.50; that as that amount could not be paid out of the \$300.00 put in escrow in the hands of Grossman, it was the opinion of the defendant that the taxes would not exceed that amount; that he so represented the fact and the plaintiff relying upon that representation agreed that only \$260.00 should be put in escrow; in other words, that there was a mistake of fact and as a consequence the trial judge should have permitted all the evidence of conversations between the parties to be submitted to the jury.

But it was not a mistake of fact. The evidence is that the taxes for 1924 were about \$40.00, but that the property was then unimproved; that in May, 1925, it was improved and a building erected upon it; that on December 3, 1925, the day of sale, at which all the parties were represented, there were negotiations as to how the matter of taxes should be disposed of. Grossman, a lawyer, at whose office the agreement of December 3, 1925, was drawn up, called by the defendant, testified that the defendant said he would not consider more than \$40.00; that the plaintiff (through his son and representative, Irvin F. Green, a lawyer) said that he would not go through with the deal unless given a prorata credit as though the property were improved; that he, Grossman, said, "Let's get together on

this. Let's fix a reasonable sum that you will prorate the taxes on and we will allow you that amount of money;" that finally the defendant said, "All right, I will allow Mr. Cowen \$40.00 on the prorata credit for the 1925 taxes, and I will leave \$260.00 up with you (Grossman) in escrow. When the 1925 general tax bill is issued, if it shall be more than \$260.00 you will give the remaining \$260.00 over to Mr. Cowen, and if it is less, you give me back the prorata difference;" that he, Grossman, then drew up the contract (which is set out above) and the parties signed it; that sometime later, in 1925, the plaintiff called him (Grossman) up and said, "Those taxes are around \$700.00" and he answered, "You made an agreement with me and went to the effect that the most you can get is \$260.00. I am perfectly will ing to give you that money." On cross-examination, Grossman testified that the parties decided among themselves that the maximum amount of taxes to be prorated for 1925 should be \$260.00, that \$40.00 was then allowed to the plaintiff, and that the remaining \$260.00 should remain in his (Grossman's) possession until presentation to him of the 1925 general tax bill.

The evidence of Ervin E. Cowen, a lawyer, who acted in the matter for his father, the plaintiff, is as follows; that on December 3, 1925, he said to the defendant, "Now about the 1925 taxes;" that the latter said, "Well, I cannot give a bill, I cannot give you a bill for the 1925 taxes, because the bill is not out yet;" that he, the witness, said, "Now are you going to close this deal?"

that then the defendant handed him a 1934 tax bill that covered the property then unimproved; that he said to the defendant, "How are we going to arrive at a figure?" that the defendant said, "Well, I don't know, I cannot give you no bill, but I will tell you what the taxes for the year 1935 will be;" that he, the witness, said, "How do you know what the 1935 tax bill will be?" that the defendant said, "I have somebody in the assessor's office who assured me the bill will be \$340.00 at most;" that later, after being at Greenman's office and while en route from Greenman's office to the witness's office, he said to the defendant, "Supposing the taxes are more than \$340.00 what will the situation be then?" that the defendant said, "You do not have to worry about that at all. I am telling you that the taxes will not be more than \$340.00. You present the tax bill to me and I will give you your check;" that he then, in his own office, paid the defendant \$2,000.00 on the purchase price.

The defendant testified that nothing was said on the subject of taxes after the agreement was signed.

Quite obviously, we think, the written contract of December 3, 1935, was entered into to settle the tax matter so that the sale could be consummated; and was made with the knowledge that neither side knew definitely what the taxes for 1935 would be. If the defendant before the contract was signed, did tell W. F. Cowan that he had been assured by some one in the assessor's office that the bill would be \$340.00 at the most, that was but a matter of opinion, and Cowan must be considered as having received it

merely for what it was worth, as such. Of course, if anything was said after the signing and execution of the written contract, it was immaterial. There is no claim, and none reasonably could be made, that what was said afterwards constituted a new contract on the subject and took the place of, or modified, in any way, the original.

Counsel for the plaintiff urges that it was the intention of both parties to pay the taxes of 1935. It may have been their desire to do so, but for two reasons it could not have been their intention to do so; in the first place, they could not in 1935 intend to pay the tax, the amount of which they knew they could not then definitely ascertain, and, in the second place, the written agreement shows they actually mutually agreed to pay a fixed sum, which obviously, at the most, was determined from hearsay and conjecture. Each knew that there was, on December 3, 1935, no way of obtaining final, definite evidence of the exact amount of the taxes, and, in view of their state in that dubious condition, and, as a matter of business, in order to settle the affair at once, and the dispute, and close the deal, made a mutually binding written agreement based on an assumed figure, which figure, however, turned out later, and when the truth was first obtainable, to be much less than the amount of the actual tax. Such a contract is not defective. Two parties, if they see fit, may make a contract based upon an assumption of fact. And, even though it may be presumed that one of them would not have so bound himself, had he anticipated the truth, still, the contract stands.

[illegible]

The evidence offered as to what transpired prior to the execution of the contract, did not even tend to show any fraud or the reliance on any misrepresentation of fact. The trial judge, therefore, was justified, under the law, in directing a finding for the defendant.

For the reasons stated, the judgment will be affirmed.

AFFIRMED

HOLEMAN AND WILSON, JJ. CONCUR.

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, for the year 1900.

427 - 31559

A. E. HALSTED,

Appellee.

v.

ROBERT GRIFF,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment, entered in the Municipal Court, upon a trial without a jury, sustaining an attachment in aid, of a claim for \$640.00, made by the plaintiff, Dr. A. E. Halsted, against the defendant, Robert Griff, for medical services alleged to have been rendered by the plaintiff to the defendant.

The suit was begun on January 18, 1926. On that date the plaintiff filed a statement of claim alleging that the defendant owed him \$640.00 for medical services rendered between October 14, 1924 and January 29, 1925. Concurrently with the filing of the statement of claim, an affidavit for attachment in aid, made by one Michela, was filed. It recited, as the grounds for attachment, that the defendant "is about to remove his property from this State, to the injury of the said A. E. Halsted; that he is about, fraudulently, to conceal, assign or otherwise dispose of his property or effects, so as to hinder and delay his creditors."

On January 29, 1936, the defendant filed an affidavit of merits in which he denied that he was indebted to the plaintiff; and set up that any services that may have been rendered to him, were performed at the request of his, the defendant's employer's insurer, under the Statute providing compensation for accidental injuries suffered in the course of employment.

The defendant, also, filed a traverse, asking that the writ of attachment in aid be quashed, because, "He is not about to remove his property from this state, to the injury of the said A. E. Halsted, and never has had the intention to remove his property from this State * * * that he is not about, fraudulently, to conceal, assign or otherwise dispose of his property or effects so as to hinder and delay his creditors," and has never intended to do so.

No brief has been filed on behalf of the plaintiff. According to the record before us, the only question passed upon by the trial judge was whether the attachment in aid was valid. He held that it was.

The evidence of the plaintiff is substantially as follows:- On or about October 14, 1924, the defendant was brought to St. Luke's Hospital, Chicago, of which the plaintiff was senior surgeon, and remained there as a patient until January 28, 1925. The defendant left the hospital at night, sometime after five o'clock on January 28, 1925, without his, the plaintiff's consent or knowledge. Shortly before he left, he promised to pay the plaintiff's bill. Since January, 1925, he, the plaintiff, sent the defendant a bill for \$640.00. Neither the General Accident Insurance Co., nor

any one else, save the defendant, promised to pay it. He, the plaintiff, delegated Michela, from his attorney's office to make the affidavit for attachment. He, the plaintiff, had the affidavit filed because he "felt" that the defendant was about to leave town; that he was led to believe that the defendant was about to dispose of, or conceal his assets, or leave the community, "Because he left without saying anything about it to me when he left the hospital and no one knew where he went." When asked by the court, "Had you made any effort yourself or had anybody made any effort to locate this fellow," he answered, "Well, he disappeared so we did not get any trace of him." "I didn't know where he was." "I made such inquiries around the hospital, but there didn't seem to be anybody know who had taken him or where he went."

On cross-examination he testified that he learned he, the defendant, went from St. Luke's to the Alexian Brothers hospital; that ^{when} he, the defendant, entered St. Luke's the book-keeper took his home address; that he, the plaintiff, through his secretary, sent him a bill to 1657 Irving avenue, the address he gave at the hospital; that that was the only effort he made to find the defendant's address; that he testified in the defendant's case, after being subpoenaed.

The evidence of the defendant is substantially as follows: At the time of the trial, he was thirty-five years of age; when injured he was living at 1647 Irving avenue. He has always lived in Chicago, save two years during which he was in the war, and part of which time he was in foreign service. He is married and has one child.

any one else, save the defendant, promised to pay it. In
the defendant's statement, there is no mention of any
one who was willing to pay it. The defendant was
the only one who was willing to pay it. The defendant was
about to leave home; that he was not to believe that the de-
fendant was about to dispose of, or conceal his assets, or
leave the community. The defendant was not willing to pay it
until it was shown to him that the defendant was not
willing to pay it. The defendant was not willing to pay it
any effort towards it or had anybody made any effort to locate
this fellow," he answered. "Well, he disappeared as we did
not get any trace of him." "I didn't know what he was."
"I made such inquiries around the hospital, but there didn't
seem to be anybody knew who had taken him or where he went."

On cross-examination he testified that he learned
he, the defendant, went from St. Luke's to the Alaskan hospital
hospital; that when the defendant, entered St. Luke's the book-
keeper told him that the defendant was not there; that he, the defendant, learned
his secretary, sent him a bill to pay for the living expenses, the
address he gave at the hospital; that that was the only effort
he made to find the defendant's address; that he testified
in the defendant's case, after being subpoenaed.

The witness at the defendant's examination

as follows: At the time of the trial, he was thirty-five
years of age; when injured he was living at 1827 Irving
avenue. He has always lived in Chicago, save two years
during which he was in the war, and part of which time he
was in foreign service. He is married and has one child.

At the time of his accident he was living in Chicago. He lives now at 2243 West North avenue. When hurt he was taken to St. Luke's Hospital in an ambulance. He was injured while driving a truck for his employer. The J. Spahn Cartage Company. He never had any talk with the plaintiff about his treating him, nor about paying his bill. He did not intend to leave Chicago, and at no time in January 1935, nor before was he about to remove his property out of this State; and has not at any time been about to conceal or try to conceal, or otherwise dispose of his property. He has some household goods, which are not wholly paid for, and on which there is a chattel mortgage. He has nearly \$12,000.00 in the hands of the Clerk of the Superior Court which has been tied up since last fall. In his suit for damages, he obtained a verdict for \$35,375.00, and settled for \$25,375.00. Several days before he left, he told the plaintiff he wanted to leave. The night he left, he told the nurse and the people in the hospital. At that time the plaintiff was not there. He did not leave any address as to where he was going. He did not feel safe with the plaintiff. They were going to bring in some doctors from the railroad company to examine him the next day. He had not consented to that, it was being done against his will, and that was the reason he went to the Alexian Brothers Hospital. His name has been in the telephone directory four to five years. When he left St. Luke's Hospital he was not able to walk, he had to be taken in an ambulance.

For the defendant, Joseph D. Ryan, an attorney was called. His evidence is to the effect that he had

at the time of the accident he was living in Oklahoma.
He lives now at 1111 West 10th Avenue, Muskogee, Oklahoma.
He was injured while driving a truck for his company, The J. G. Smith
Lumber Company. He never had any talk with the plaintiff
about his traveling and was never paying his bill. He
did not intend to leave Muskogee, and at no time in January
1935, nor before was he about to remove his property out
of this State; and has not at any time been about to
remove or try to remove, or otherwise dispose of his
property. He has never received notice, while the truck
was paid for, and on which there is a chattel mortgage.
He was nearly \$12,000.00 in the hands of the Clerk of the
Superior Court when he was taken up since last fall.
In his suit for damages, he obtained a verdict for \$26,375.00,
and settled for \$25,375.00. Several days before he left,
he told the plaintiff he wanted to leave. The night he left,
he told the nurse and the people in the hospital. At that
time the plaintiff was not there. He did not leave any
address or to where he was going. He did not talk with
the plaintiff. They were going to bring in some doctors
from the railroad company to examine him the next day. He
had not consented to that, it was being done against his will,
and that was the reason he went to the Alaskan Brothers
Hospital. His name has been in the telephone directory
four to five years. When he left St. Luke's Hospital he
was not able to walk, he had to be taken in an ambulance.
For the defendant, Joseph E. Ryan, an attorney
was called. A subpoena is to the effect that he had

difficulty getting the plaintiff as a witness in the defendant's damage suit, difficulty in serving him with a subpoena; that the plaintiff was very frank, but said he did not want to be a witness because of certain circumstances which had occurred; that he asked the plaintiff if his doctor's bill had been paid; that the plaintiff said he was not looking to the defendant for pay for any services; that the insurance company told him that it would pay him; that at the trial of the damage suit the plaintiff finally attempted to say that the defendant would be all right; that the court, practically, let him cross-examine the plaintiff on account of his hostility; that the plaintiff testified that the last time he saw the defendant, he went out of the hospital without his knowledge. Called in rebuttal, the plaintiff testified that he had nothing to do with railroad doctors coming; that the defendant said nothing on that subject.

The question for decision is whether the evidence proved by a preponderance that (1) the defendant was about to remove his property from the State; (2) that he was about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors. "The burden of showing ground within the statute for an attachment was upon the plaintiff." Jaycox v. Wing, 86 Ill. 192.

An attachment in aid is an extraordinary remedy, in derogation of the common law, and the statute is generally strictly construed against one who undertakes to have it

The question for decision is whether the evidence proved by a preponderance that (1) the defendant was alone in removing his property from the estate; (2) that he was alone in fraudulently converting, selling or otherwise disposing of his property or efforts so as to hinder or delay his creditors. The burden of showing fraud against the estate for an

127. In addition to the fact that the Government is not in a position to pay the interest on the bonds, the Government is not in a position to pay the principal of the bonds. The Government is not in a position to pay the principal of the bonds.

applied. Weber Chimney Co. v. Johnson, 205 Ill. App. 348. The grounds of attachment must be strictly proven, and the writ will never be granted unless it is made to appear that the grounds therefor are well founded. Maywood v. Collins, 60 Ill. 328; Pack, Woods & Co. v. Am. Trust & Savings Bank, 172 Ill. 192.

The full scope of the plaintiff's evidence is that, as the plaintiff testified, he had the affidavit made "Because he (the defendant) left without saying anything about it to me when he left the hospital and no one knew where he went." In view of what the record discloses, that he left in an ambulance, as he could not walk, and was taken to the Alexian Brothers Hospital; that he was a family man, and had a wife and child; that he had always lived in Chicago, save when he was in the war; that his name had been in the telephone directory from four to five years up to the time in question, and at the time he was hurt maintained a residence at 1647 Irving avenue, Chicago, and moved afterwards to 2243 West North avenue, a block away; that he left, apparently, merely to go from one hospital to another, and, if we are to give any credence to the defendant's testimony, because he desired to be under different medical auspices, it certainly cannot reasonably be said that the plaintiff has proved either that the defendant was about to remove his property from the State, or about fraudulently to conceal, assign or otherwise dispose of his property. That the plaintiff, learning that the defendant had left St. Luke's Hospital and without telling him when and where he was going, suspected

an effort on the part of the defendant to remove his property out of the State or to otherwise dispose of his property, is not sufficient, even if taken without considering the other evidence, to make out a case under the statute. Far from it. We know of no case that holds that a mere vague conjecture, based on conduct which is as consistent with an honest purpose, as with a dishonest one, is sufficient to make out a cause of action by a preponderance of proof.

Considering all the evidence, we are clearly of the opinion that the court erred in finding the issues as to the attachment against the defendant. The judgment will be reversed and the cause remanded with directions to quash the writ of attachment.

REVERSED AND REMANDED WITH DIRECTIONS.

HOLEMAN AND WILSON, JJ. CONCUR.

439 - 31571

FRANK MILLER,

Appellee,

v.

ADOLPH STRESENREUTER,

Appellant.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 19, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

In December, 1924, Frank Miller, brought suit in the Superior Court of Cook County, against Adolph Stresenreuter, for damages for the negligent construction of a building owned by the plaintiff. There was a trial before the court, with a jury, and a verdict and judgment for the plaintiff in the sum of \$5,500.00. This appeal is from that judgment.

The declaration alleged that, on October 15, 1922, the plaintiff and the defendant entered into a contract whereby the defendant agreed to erect a certain building, "and to do the same in a workmanlike and skillful manner;" that the "workmanship should be first-class in every respect and satisfactory to the plaintiff;" that the plaintiff performed his part of the contract, but the defendant,

"unskillfully, carelessly, negligently, and improperly made and laid out the east wall of the said building, and improperly used such improper materials in making said east wall, and improperly and negligently used loose

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THE - COURT

THE COURT

Appellate

v.

THE COURT

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THE COURT

Opinion filed Oct. 19, 1937.

THE COURT

THE COURT

In December, 1934, Frank Miller, plaintiff, and

in the Superior Court of Cook County, against

defendants, for damages for the negligent construction

tion of a building owned by the plaintiff. There was a

trial before the court, with a jury, and a verdict and

judgment for the plaintiff in the sum of \$5,000.00. This

appeal is from that judgment.

The defendant alleged that, on October 15,

1934, the plaintiff and the defendant entered into a

contract whereby the defendant agreed to erect a certain

building, "and so to do the same in a workmanlike and skill-

ful manner;" that the "workmanlike" should be first-class

in every respect and satisfactory to the plaintiff; that

the plaintiff purchased his part of the contract, and the

"workmanlike" should be first-class in every respect and satisfactory to the plaintiff; that the plaintiff purchased his part of the contract, and the

lime mortar in the said construction thereof, that through the unskillfulness, carelessness, negligence and improper conduct of the said defendant in this behalf, the east wall of the said building did, on the first day of July, 1924, cave in and collapse, together with the roof thereon, and he, the said plaintiff was forced to, and obliged to, and did, necessarily lay out and expend a large sum of money in and about making and rebuilding the said wall and roof."

to the damage of the plaintiff in the sum of \$20,000.00.

The defendant filed a plea of the general issue. At the trial, on January 27, 1926, the plaintiff introduced in evidence the building contract between the plaintiff and the defendant, and certain plans and specifications; and, also, introduced evidence to show that in doing the brick work, the mortar that was used was poor and faultily mixed, and that the foundations under the rear or east wall which collapsed, were not deep enough in the ground either to be below the frost line, or to be said to be built in a workmanlike manner. The defendant introduced evidence tending to show that the mortar was properly mixed, and that all the work was done in accordance with the plans and specifications. The plaintiff, also, introduced evidence as to the cost of rebuilding the foundations, wall and roof, and as to the estimated cost to rebuild the part which collapsed, and, also, as to the cost of removing the debris and obtaining places to dump it.

The defendant seeks to reverse the judgment of the trial court on the ground that he faithfully followed the plans and specifications furnished to him by the plaintiff; that the plaintiff failed to prove his case

The defendant killed a man at the General's house.

The defendant asked to reverse the judgment of

the trial court on the ground that he tentatively followed the plans and execution furnished to him by the defendant, and the court failed to prove his case.

by a preponderance of the evidence; that the trial court improperly admitted, in behalf of the plaintiff, certain evidence as to special damages, and that there was no proper evidence in the record to sustain the verdict in the amount of \$5,500.00.

As to the plans and specifications, and whether the building was constructed by the defendant in accordance therewith; and, also, as to whether the defendant constructed the building in a skillful and workmanlike manner: - The building in question was built at 3611 Auburn Avenue, Chicago. It was erected by the plaintiff as a warehouse for the storage of sawdust and shavings. It faced west, with an alley on the south. It was a brick building, 75 feet wide, 133 feet long, and 28 feet high. The east wall, the one that fell, was 75 feet long, 28 feet high and 17 inches thick, with a cement foundation approximately four feet deep. During the construction of the building, according to the testimony of the plaintiff, neither he nor the defendant had any superintendent, or other person, looking after the work, although the contract provided by its terms that the building should be erected according to the plans and specifications, and drawings made by Koehner & Larson, architects, "to the satisfaction and under the direction of the said architects." The building was finished about January 10, 1923, and, thereafter, occupied by the plaintiff as a warehouse for sawdust and shavings. Sometime in the night of July 1, 1924, the east wall collapsed and fell out, taking with it part of the roof.

of a comparison of the evidence; that the total weight
of the evidence, as shown by the exhibits, contains
evidence as to several matters, and that there was no
evidence as to the matter of weight and weight
in the amount of \$2,500.00.

As to the place and surroundings, and whether
the building was connected by the defendant in records
was identified; and, also, as to whether the defendant
connected the building in a similar and workmanlike
manner - the building in question was built at 2211
Fourth Avenue, Chicago. It was erected by the plaintiff
as a warehouse for the storage of sundries and hardware.
It faced west, with an alley on the east. It was a
brick building, 75 feet wide, 125 feet long, and 25
feet high. The east wall, the one that fell, was 75
feet long, 15 feet high and 15 inches thick, with a
single horizontal reinforcement bar that ran. During
the construction of the building, according to the testi-
mony of the plaintiff, neither he nor the defendant had
any superintendence, or other person, looking after the
work, although the contract provided by its terms that the
building should be erected according to the plans and
specifications, and drawings made by Hooker & Benson,
architects, "as shown and under the direction
of the said architect." The building was finished about
January 15, 1904, and, according to the plain-
tiff is a warehouse for sundries and hardware. According
to the right of July 1, 1904, the west wall collapsed
and fell out, falling with it part of the roof.

As to whether the defendant, in the construction of the building, followed the general requirements of the plans and specifications, leaving out the question of the quality of the work, we think that the evidence sufficiently shows that he did; and as it is the law that where one does the work strictly in conformity to plans and specifications, he is not liable for any defects in the work that may be due to faulty structural requirements contained in the plans and specifications, it follows that the only question that remains is, whether, from the evidence as to the quality of the workmanship, we would be justified in overriding the verdict of the jury. In MacRitchie v. City of Lakeview, 30 Ill. App. 392, the court said:

"Ordinarily a contractor who agrees to do work according to the plan and under the direction of an engineer or architect, is not understood to insure the sufficiency of the plan, nor undertake as to the scientific correctness of the specifications or the verbal or written directions. His own skill and the skill and fidelity of his workmen, as well as the sufficiency of the material which he supplies, he is bound for, and there is nothing unreasonable in requiring a guaranty in such a contract that the workmanship and the material furnished by him should stand the test for a certain period of time after the completion and acceptance of the work; but it would certainly be regarded as most extraordinary to find that a contractor had undertaken to warrant the perfection of a plan which is designed by the person for whom he is to do the work, or the wisdom of directions given during the progress of the work by one whom he cannot control, but whose orders in the execution of the work he is, by the terms of the contract, bound to obey. Contracts must receive just and reasonable interpretation."

Clark v. Foss, 70 Ill. 128; Conway Company v. City of Chicago, 274 Ill. 382; MacKnight Flintic Stone Co. v. The Mayor, 160 N.Y. 72; 3 O.J. 752; Filbert, et al v. Philadelphia, 181

it is stated in the indictment, in the indictment of the building, followed the personal requirements of the plans and specifications, leaving out the question of the quality of the work, we think that the evidence sufficient to show that he did not do it in the way that others have the work exactly in conformity to plans and specifications, he is not liable for any defects in the work that may be due to faulty structural requirements contained in the plans and specifications, it follows that the only question that remains is, whether, from the evidence as to the quality of the workmanship, we would be justified in concluding the verdict of the jury. In Wheeler v. City of Seattle, 35 Ill. App. 386, the court said:

"...that a contractor who contracts to do work according to the plans and under the direction of an architect or engineer, is not permitted to ignore the will of the architect or engineer, but must follow the architect's orders as to the specifications of the work. The contractor is bound to follow the plans and specifications of the architect, and will be liable for the quality of the work. The architect is not liable for the quality of the work, but is liable for the quality of the plans and specifications. In the case of Wheeler v. City of Seattle, the court said: 'The contractor is bound to follow the plans and specifications of the architect, and will be liable for the quality of the work. The architect is not liable for the quality of the work, but is liable for the quality of the plans and specifications.'"

Clark v. Board of Health, 70 Ill. 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Penn. St. 530; Bancroft v. San Francisco Tool Co., 120 Cal. 228; Bentley v. The State, 75 Wis. 416.

Evidence was introduced on the part of the plaintiff tending to show that the wall became weak through improper mixing of the mortar that was used in building the brick wall; and, also, that the foundation was not deep enough and was not below the frost line, and that the action of the frost, or the instability of the soil, caused the foundation to give way. For the plaintiff, three witnesses testified as to the condition of the mortar after the wall fell; and for the defendant, three witnesses testified as to the actual mixing of the mortar at the time the building was constructed.

The evidence of the plaintiff's witnesses, all of whom got what knowledge they had on the subject from an examination of parts of the wall that fell, was that the lime used in making the mortar was not properly slaked. The defendant's witnesses, made up of the defendant, the mason contractor, and the mason foreman, all testified that the mortar was made with properly slaked lime. The evidence on the subject was in direct conflict. After examining it carefully, and in view of the verdict, we do not feel warranted in holding that the jury was not justified in concluding that the work was done in an unskillful and unworkmanlike manner.

It is urged that as similar mortar was used, or may have been used in all the walls, either all of the walls would have collapsed, or there was some other cause

Exhibit 10. Exhibit 10. The Foundation
Exhibit 10. The Foundation

Evidence was introduced on the part of the
plaintiff tending to show that the well became weak
through improper mixing of the mortar that was used in
building the brick wall; and, also, that the foundation
was not deep enough and was not below the frost line, and
that the action of the frost, on the instability of the
wall, caused the foundation to give way. Now the witness
asked, where witnesses testified as to the condition of
the mortar when the wall fell; and for the defendant,
three witnesses testified as to the actual mixing of the
mortar at the time the building was constructed.

The evidence of the plaintiff's witnesses, all
of whom got their knowledge from the subject from an
examination of parts of the wall that fell, was that the
lime used in making the mortar was not properly slaked.
The defendant's witnesses, each of whom testified
known contractor, and the union foreman, all testified
that the mortar was made with properly slaked lime. The
evidence on the subject was in direct conflict. After
examining it carefully, and in view of the verdict, we do
not feel warranted in holding that the jury was not justified
in concluding that the work was done in an unskillful and
unworkmanlike manner.

It is urged that no similar mortar was used,
or may have been used in all the wells, either all of the
wells would have collapsed, or there was some other cause

for the collapse of the rear wall; and that there is evidence that the foundation of the rear wall, although built in accordance with the express requirements of the plans and specifications, was not put down deep enough properly to sustain and make secure such a wall. The plan of the building provided for a foundation four feet deep; that is, four feet below the level of the sidewalk, or grade level. The lot itself sloped from the west front down to the east line, and although the west end of the lot was up to grade, the surface at the rear end was about 3 feet, 2 inches lower. Notwithstanding, however, the disparity between the elevation of the surface of the lot at the west end and the east end, the walls, both the east and west, as built, were, as provided in the plans and specifications, all put in four feet below grade. But as built, as a result of the slope of the lot, the east or rear foundation was only 10 inches below the actual surface of the ground.

Mace, an appraiser who had testified he had large experience in handling disputes between owners and builders, testified that after the wall fell "The foundation 3 feet below the footing was bulged out about 2 inches from the north to the east side, bulged like a bow, and large cracks filled sections of it. The rest of the wall was nearly all down, and pulled away the east section of the roof."

It is the evidence of Olson, witness for the defendant, and the one who built the wall, that when they

for the collapse of the rear wall; and that there is evidence that the foundation of the rear wall, although built in accordance with the approved requirements of the plans and specifications, was not put down deep enough properly to ensure and make secure such a wall. The plan of the building provided for a foundation that foot deep; that is, four feet below the level of the finished, or grade level. The lot itself sloped from the rear front down to the east line, and although the west end of the lot was up to grade, the surface at the rear end was about 2 feet, 8 inches lower. Notwithstanding this, however, the disparity between the elevation of the surface of the lot at the west end and the east end, the walls, both the east and west, as built, were, as provided in the plans and specifications, all put in four feet below grade. But as built, as a result of the slope of the lot, the east or rear foundation was only 10 inches below the actual surface of the ground.

Now, an engineer who had testified he had large experience in building bridges between coasts and boulders, testified that after the wall fell the foundation 2 feet below the existing was pulled out about 2 inches from the north to the east side, pulled into a bow, and large cracks filled sections of it. The west of the wall was nearly all down, and pulled away the east section of the wall.

It is the evidence of Green, witness for the defendant, and the one who built the wall, that when they

went down 4 feet, they found cinders, and then went down a foot to 18 inches lower than the plan called for "in places where the ground was soft, or not suitable for building. We went down more than 4 feet all over, and there was no place where the foundation was less than 4 feet deep."

When Westcott, for the plaintiff, a specialist in building construction, was asked, "What investigation did you make to ascertain the cause of the collapse, and give us the result, he stated, "I found that the foundation had given, - apparently on account of the soil not being sufficient to withstand the pressure, and also that the roof joists had pulled away from the rest of the roof, not having been sufficiently anchored to the rest of the roof. It is my opinion that the trouble was caused by defective construction."

There is some evidence on the subject of "pin anchors", or anchors. Westcott and Mace, for the plaintiff, testified that they found none; while, on the other hand, Olson, for the defendant, testified, "We put some pin anchors on the back wall; that although the specifications did not call for that, they were put in because it really belongs to the mason to anchor in the masonry." "We do that whether we find it in the specifications or not"

It will thus be seen that the evidence presented chiefly three matters of fact to the jury: First, the way in which the brick wall was built, as regards the

went down a foot, they found cinders, and then went down
a foot or so further down the place called for
places where the ground was soft, or not suitable for
building. He went down more than a foot all over, and
there was no place where the foundation was less than a foot
deep.

That account, for the situation, a specialist
in building construction, and asked, "What investigation
then did you make to ascertain the cause of the collapse, and
give us the result," he stated, "I found that the foundation
was about a foot or so below the level of the soil and being
sufficiently deep to support the pressure, and also that the
roof joists had pulled away from the rest of the roof, not
having been sufficiently anchored to the rest of the roof.
It is my opinion that the trouble was caused by defective
construction."

There is some evidence on the subject of "pin
anchors," or anchors. Contact and some, for the plain-
riffs, testified that they found none; while, on the other
hand, others, for the defendant, testified that they found
pin anchors on the floor walls. But although the specifications
did not call for that, they were not in because it really
belongs to the owner to anchor in the masonry. "We
do not think anything is in the specifications or not."

It all seems to be that the evidence presented
clearly shows failure of test to the jury; and the
way in which the trial was held, in regard to the

quality of the mortar used; second, the condition of the foundation; and, third, the pin anchors, which are placed to hold the brickwork in its place.

The only express charge of fact in the declaration, as constituting carelessness and negligence, is that the defendant "improperly and negligently used loose lime mortar" in the construction of the wall; and the record does not show that any instructions were given to the jury. The result is that we are left to infer that the verdict of the jury was based on the conclusion that the wall was not built in a workmanlike way because of the bad mortar which was used; and it follows from that, that the question whether pin anchors were put in, although not specified in the specifications, and the question whether the rear foundation was too shallow, though built, as to grade, according to the plans and specifications, are immaterial, unless the evidence shows that the matter of pin anchors and the way in which the foundation was built had more to do with the falling of the wall than the kind of mortar which was used. The defendant, however, is not entitled to claim that pin anchors were in any way the cause, because his witness Olson says he put them in. There remains then the conflict between the charge by the plaintiff that the poor mortar was the cause, and the claim of the defendant that the plans for the foundation were at fault. In view of what we have already said, we do not feel that the evidence sufficiently shows that the wall fell because it was built according to a faulty plan, to justify

quality of the water used; second, the condition of the foundation, third, the condition of the water, and fourth, the condition of the water.

The only question which is left in the balance-

tion, an accounting of the water and the water, is that the defendant improperly and negligently used loose line mortar in the construction of the wall;

and the result was that the wall was destroyed and the result is that we are left to

infer that the verdict of the jury was based on the conclusion that the wall was not built in a workmanlike way because of the use of mortar which was used; and it

follows from that, that the defendant was negligent and the question whether the wall was built in a workmanlike way and the question whether the wall was built in a workmanlike way

and the question whether the wall was built in a workmanlike way and the question whether the wall was built in a workmanlike way

plans and specifications, are immaterial, unless the evidence shows that the mortar of the mortar and the way

in which the foundation was built had more to do with the falling of the wall than the kind of mortar which was

used. The defendant, however, is not entitled to claim that the anchors were in any way the cause, because his

witness shows that he put them in. They remain then the conflict between the charge by the plaintiff that the

poor mortar was the cause, and the claim of the defendant that the cause for the foundation was at fault. In

view of what we have already said, we do not feel that the evidence sufficiently shows that the wall fell be-

cause it was built according to a fairly high, so justly

overriding a verdict based upon negligence in the quality of the actual work in its construction.

It is contended by the defendant that the court erred in admitting evidence that it cost the plaintiff \$200.00 for labor to remove the debris, which included 200 tons of sawdust and the brick, mortar and broken timbers, and that it cost in labor and for the privilege of dumping the sawdust in various places about \$3,200.00. The declaration charges that "the plaintiff was forced to, and obliged to, and did necessarily lay out and expend a large sum of money in and about making and rebuilding the said wall and roof."

Counsel for the defendant argue that the damages mentioned are not within the damages pleaded. We think they were. What was expended "in and about making and rebuilding the said wall and roof", certainly involved removal of the debris, temporary removal and storage of the sawdust, and all labor connected therewith; all those things "accrued from the act complained of." Olmstead v. Burke, 25 Ill. 74,76. The removal of the debris and the storage of the sawdust were a direct consequence of the falling of the wall and a necessary prerequisite to its rebuilding.

It is contended that the verdict of \$5,500.00 is excessive. Various figures as to the entire work of rebuilding the wall, including the foundation and roof, were put in evidence. Regnery, Berg and Westcott, for the

overseeing a limited amount of work in the
the quality of the actual work in its construction.

It is contended by the defendant that the costs
incurred in removing the debris, which included
\$100.00 for labor to remove the debris, which included
300 tons of material and the price, material and broken
limbs, and that in case in labor and for the privilege
of changing the contract in various places about \$2,500.00.
The defendant claims that the plaintiff was forced to
and obliging it, and all materiality pay and repair
a large sum of money in and about making and rebuilding
the said wall and roof.

It is contended for the defendant again that the
damages mentioned are not within the damages claimed.
It is also contended that the damages claimed are not
making and rebuilding the said wall and roof, certainly
involve removal of the debris, necessary removal and
storage of the material, and all labor connected therewith;
all these things "amount to the same thing."
It is also contended that the removal of the
debris and the storage of the material were a direct conse-
quence of the falling of the wall and a necessary pre-
requisite to the rebuilding.

It is contended that the verdict of \$2,500.00
is excessive. Various figures are as to the cost of
rebuilding the wall, including the foundation and roof,
are set out in evidence. However, they are not

plaintiff, gave, respectively, the figures, \$3,650.00, \$2,300.00, and \$4,400.00; and Kocher and the defendant, respectively, \$2,550.00 and \$2,000.00. Obviously, the difference between one of these figures and the amount of the verdict was allowed for removal of the debris and taking care of the sawdust. The evidence of the plaintiff is that when the wall fell there were about 200 tons of sawdust, and the brick, mortar and broken timbers to be removed; that in labor and for the privilege of dumping it in various places, where charges were made, it cost \$3,300.00; that it took, with wagons and horses, six weeks to remove it. There being no substantial evidence to the contrary, we feel bound to consider the verdict justified. It is contended for the defendant that the evidence on damages was allowed to be put in an rebuttal, and that such was error, but we are unable to find in the record that any objection was made when the testimony was given.

For the reasons stated above, the judgment will be affirmed.

AFFIRMED.

HOLDEN AND WILSON, JJ. CONCUR.

testimony, that, respectively, the figures, \$1,400.00, \$2,200.00, and \$4,400.00, are correct and the balance, respectively, \$1,200.00 and \$2,200.00, incorrectly, the difference between the above figures and the amount

of the verdict was allowed for removal of the debris and being one of the amounts. The evidence of the plaintiff is that when the wall fell there were about 200 tons of material, and the brick, mortar and broken stones as he testified that he later saw for the plaintiff and dumping it in various places, where charges were made, it was \$1,200.00 and is now, with wages and

other, it came to figure 12. There being no substantial evidence to the contrary, we feel bound to sustain the

verdict justified. It is contended for the defendant that

the evidence on damages was allowed to be put in on two

points, and that much was error, but we are unable to find

in the record that any objection was made when the parties

were heard.

For the reasons stated above, the judgment will

be affirmed.

ATTEST.

HOLMAN AND ALLEN, J. J. DORRIS.

448 - 31580

CARROLL, SCHENDORF & BOENICKE, INC.,)	
Appellee,)	APPEAL FROM
)	MUNICIPAL COURT
v.)	OF CHICAGO.
JOHN A. GORDON,)	
Appellant.)	

Opinion filed Oct. 19, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment in the sum of \$1500.00 obtained by Carroll, Schendorf & Boenicke, Inc., the plaintiff, against John A. Gordon, the defendant in the Municipal Court upon a trial without a jury, for services alleged to have been rendered by the plaintiff in obtaining a purchaser for certain real estate.

On April 25, 1925, the plaintiff filed a statement of claim. It alleged that the plaintiff's claim was "for a real estate commission or brokerage for finding a purchaser ready, willing and able to purchase 75 feet on east side of Stony Island avenue, Chicago * * * for the sum of thirty thousand dollars, the defendant having employed plaintiff to sell said property. The fair, reasonable value of said services is the sum of \$1500.00."

On the same day an affidavit of attachment on the ground of the non-residence of the defendant, was filed. A writ of attachment was duly issued and levied upon the real estate in question.

APPELLANT
JOHN A. GUNN
v.
APPEELEE
GEO. W. BROWN & SONS, INC.

Opinion filed Oct. 18, 1937.

THE FOLLOWING FACTS ARE

STATED BY THE COURT.

This is an appeal from a judgment in the sum of \$1000.00 rendered by the Circuit Court of Cook County, Illinois, in the case of John A. Gunn, Plaintiff, against Geo. W. Brown & Sons, Inc., Defendant. The judgment was rendered on a trial by jury, the jury having found in favor of the plaintiff and awarded him the sum of \$1000.00 with costs.

On April 20, 1936, the plaintiff filed a statement of claim. It alleged that the defendant's claim was for a real estate commission or brokerage for finding a purchaser ready, willing and able to purchase 75 feet on west side of North Third Avenue, Chicago - " - for the sum of thirty thousand dollars, the defendant having employed him to sell said real property. The fair, reasonable value of said services is the sum of \$1000.00.

On the same day an affidavit of statement in the ground of the non-residence of the defendant, was filed. A writ of attachment was duly issued and levied upon the real estate in question.

On June 29, 1925, Martin G. Loeff, as the duly authorized agent for the defendant, filed an affidavit of merits in which it was denied that the defendant was indebted to the plaintiff in any way or that the defendant had any interest in the property in question or that the plaintiff procured a buyer ready, able and willing to purchase the property at the price and on the terms fixed by the defendant. It was alleged that the defendant sold the premises in question through the agency of another broker whom he compensated for his services in negotiating the sale.

The evidence at the trial showed that the transaction in question consisted chiefly of certain telegrams which were sent by the defendant and his wife from Monrovia, California, where they lived, to the plaintiff in Chicago; telegrams sent by the plaintiff from Chicago to the defendant at Monrovia; certain conversations between Nuttall, an employee of the plaintiff, Rogers, Manager for the plaintiff, on the one hand, and Loeff, an attorney, and agent of the defendant on the other; a written contract that was mailed to the defendant, and the testimony of Weber, who ultimately purchased the property from the defendant. Ten telegrams, which passed between the parties, were introduced in evidence.

(1) On April 7, 1925, the plaintiff telegraphed the defendant in California,

"Have offered twenty seven thousand five hundred for your seventy-five feet. * * * Half cash balance on or before one year with interest six per cent stop Advise by wire collect your instructions stop Your address was given us by Mr. Gallagher of our Forty seventh street office."

On June 22, 1935, Martin O. Loebl, as the only

defendant named in the complaint, filed an affidavit in
which it was stated that the defendant was in-
debted to the plaintiff in any way or that the defendant
had any interest in the property in question or that the
plaintiff possessed a paper money, note and bill or any
other property of the value and on the terms fixed by
the defendant. It was alleged that the defendant sold the
business in question through the agency of another broker
whom he compensated for his services in negotiating the sale.

The witness at the trial showed that the trans-

action in question consisted chiefly of certain telephone
calls made by the defendant and his wife from Honolulu,
California, where they lived, to the plaintiff in Chicago;
telephone calls by the plaintiff from Chicago to the defendant
at Honolulu; certain conversations between Loebl, an employee
of the plaintiff, Rogers, manager for the plaintiff, on the
one hand, and Loebl, an attorney, and agent of the defendant
on the other; a written contract that was mailed to the
defendant, and the testimony of Weber, who ultimately purchased
the property from the defendant. Ten telephone calls passed
between the parties, were introduced in evidence.

(1) On April 7, 1935, the plaintiff telephoned

the defendant in California.

"I have offered twenty seven thousand five hundred
for your seven-thirty five. . . . Will you please
let me know if you will accept this offer and if so
advise me by wire or mail. Your attention is called to the
address given me by Mr. Loebl of New York
seventy street office."

The same day the plaintiff telegraphed,

"What is high offer? Advise definite price you will accept."

April 8, 1935, the defendant telegraphed to the plaintiff,

"Have had three offers. Am holding my decision until tomorrow. My man will take it."

On the same day the defendant telegraphed to the plaintiff,

"Will sell for \$400.00 per foot your terms. If O.K. will wire instructions. Answer at once."

On April 9, 1935, the plaintiff telegraphed the defendant,

"Think can get twenty nine thousand, fourteen thousand cash, balance one year."

On the same day, April 9th, the defendant telegraphed to the plaintiff,

"I will sell for thirty thousand dollars, half cash, balance in twelve months. If this is not acceptable I will raise price to five hundred dollars per foot and will hold until I get that price. This is final."

On April 10, 1935. the plaintiff telegraphed to Clara H. Gordon, (wife of the defendant)

"Have contract signed at thirty thousand dollars, fifteen thousand cash, balance on or before one year. Also, two thousand dollars earnest money. Upon your wiring acceptance will forward contract for you to sign. Acceptance must be had within twenty four hours or earnest money is to be returned. Sign reply Clara H. Gordon."

On the same day, April 10, the defendant telegraphed the plaintiff:

The same for the Plaintiff telegraphed.

"That is all right. Please inform."

"Thank you very much."

April 8, 1932, the defendant telegraphed to

the Plaintiff,

"I have had three offers. In holding

of holding until tomorrow. It will

be 12%."

On the same day the Plaintiff telegraphed to

the Plaintiff,

"Will sell for \$200,000 per foot of

land. It will be instructions.

Amount of one."

On April 8, 1932, the Plaintiff telegraphed the

defendant,

"I have had three offers. In holding

of holding until tomorrow. It will

be 12%."

On the same day, April 8th, the defendant

telegraphed to the Plaintiff,

"I will sell for \$200,000 per foot of

land. It will be instructions. It will

be 12%."

On April 10, 1932, the Plaintiff telegraphed to

Glenn H. Gordon (wife of the defendant)

"I have received signed by Glenn H. Gordon

of \$200,000 per foot of land. It will

be 12%."

On the same day, April 10, the defendant

telegraphed the Plaintiff:

"Your offer accepted with the understanding I have only one commission to pay. There has been several firms after this property, so if there is any trouble over commission this deal will be off. I will sign your contract with this understanding. But for your information will say I have not accepted or signed any other proposition but yours. My attorney M. G. Loeff * * * will handle this matter for me."

On the same day, April 10, the defendant telegraphed the plaintiff,

"Your offer just received. Will take twenty thousand cash, balance in six months. Must have return answer. Answer Postal."

On the same day, April 10, the plaintiff telegraphed to the defendant,

"Your proposition accepted. Contract on the way for your signature."

In addition to the foregoing, an undated telegram was sent by the defendant, signed by him, to the plaintiff and received by the latter on April 25, 1925, as follows,

"Thos. Gordon will not sign contract you submitted. Deal will be called off."

It will be seen from the foregoing telegrams that, excluding the question of authority on the part of the defendant there was not only a meeting of minds, but a complete, consummated agreement between the plaintiff and the defendant that the defendant would sell the property for "twenty thousand cash, balance in six months" to the purchaser the plaintiff had obtained.

Evidence was introduced, however, on the part of the defendant in an endeavor to show that the actual written contract of sale that was later presented by the plaintiff to Loeff, defendant's agent in Chicago and

which was signed by Weber, the prospective purchaser, did not conform to the terms made by the contract evidenced by the telegrams. On the other hand, evidence was introduced on the plaintiff's part, to show that the contract signed by Weber, was taken to Loeff's office and after some discussion as to a matter of interest and the production of evidence as to special assessments, Loeff said, "Well, everything seems to be in order," and, that, thereupon the request of Nuttall, who conducted the negotiations for the plaintiff, Loeff, at his Nuttall's special request sent a copy of the written contract by air mail to the defendant for signature. We have examined all the evidence on the subject and are of the opinion that although there is considerable conflict between that of Nuttall and Rogers for the plaintiff, and that of Loeff for the defendant, we would not on that account be justified in overriding the judgment of the trial judge. It involves purely a matter of credibility and on that subject we are disadvantageously situated. Considering the telegrams and assuming as we do, the truth of the testimony of Nuttall and Rogers, as to their negotiations with Loeff, and the fact that Weber, the prospective purchaser, had signed the contract and paid down \$2,000.00 as earnest money, and that a copy of it had been sent by Loeff to the defendant, we are of the opinion that the evidence sufficiently proved that the plaintiff produced a purchaser ready, able and willing to purchase the property on the terms authorized by the defendant. It is urged by counsel for the defendant that the contract submitted was different from the one made or authorized by the telegrams.

which was signed by Weber, the prospective purchaser, did not constitute the same as by the witness introduced by the defendant. On the other hand, evidence was introduced as to the plaintiff's part, to show that the contract signed by Weber, was taken to Locoff's office and after some discussion as to a matter of interest and the production of evidence as to special circumstances, Locoff said, "Well, everything seems to be in order," and, that, therefore, the witness of Locoff, who executed the negotiations for the plaintiff, Locoff, at his Locoff's special request sent a copy of the written contract by air mail to the defendant for signature. We have examined all the evidence on the subject and are of the opinion that although there is considerable conflict between that of Kettell and Rogers for the plaintiff, and that of Locoff for the defendant, we would not on that account be justified in overriding the judgment of the trial judge. It involves purely a matter of credibility and on that subject we are disproportionately situated. Considering the testimony and assuming as we do, the truth of the testimony of Kettell and Rogers, as to their negotiation with Locoff, and the fact that Weber, the prospective purchaser, had signed the contract and paid down \$5,000.00 as earnest money, and that a copy of it had been sent by Locoff to the defendant, we are of the opinion that the evidence sufficiently proved that the plaintiff produced a purchaser ready, able and willing to purchase the property on the terms submitted by the defendant. It is noted by the witness for the defendant that the witness executed the negotiations from the one side or introduced by the witness.

But the defendant, as to details, that is, after his acceptance of the proposition made by the plaintiff, in one of his telegrams of April 10, said "My attorney, M. G. Loeff * * * will handle this matter for me", and as a result the matter was taken up with Loeff, and both Nuttall and Rogers say it terminated in mutual agreement and satisfaction and that Loeff himself sent the finished contract, or a copy of it, to the defendant for his signature. In those circumstances it does not make any difference what the contract contained; there was then no locus penitentiae; the plaintiff had completed its service and earned its commissions.

The evidence shows that afterwards Weber, the prospective purchaser that the plaintiff produced, bought the property through Swanson & House, another firm of brokers, and that he paid \$30,000.00 for it. Weber testified that he got title through one Hickey, who, he then supposed, was the owner, but who was, he intimates, a dummy. It is urged for the defendant that the plaintiff abandoned its efforts to procure a purchaser; but as we have above stated, the evidence is such that we do not feel justified in holding contrary to the trial judge, and are of the opinion that the evidence sufficiently proves the procurement of a purchaser and repudiation by the defendant.

Complaint is made that there was no contract of employment of the broker. The telegrams and the evidence of Nuttall and Rogers prove the contrary. It is argued that the statement of claim does not allege that there was a contract. This is a case in the Municipal Court,

But the defendant, as he testified, that in, after his receipt-
ance of the proposition made by the plaintiff, in one of his
telegrams of April 10, said "My attorney, W. B. Lusk" and
will please write me soon, and as a result the parties
was taken up with Lusk, and both Lusk and Rogers say it
terminated in mutual agreement and satisfaction and that
Lusk himself sent the finished contract, or a copy of it,
to the defendant for his signature. In these circumstances
it does not make any difference that the contract contained
there was no issue pending; the plaintiff had un-
derstood the matter and signed the contract.

The evidence shows that afterwards, the pro-
positional contract that the plaintiff produced, bought the
property through Hanson & Hanson, another firm of brokers,
and that he paid \$50,000.00 for it. When testifies that
he got title through one Nickay, who, he then supposed, was
the owner, but who was, he testified, a dummy. It is urged
for the defendant that the plaintiff abandoned its efforts
to procure a purchase; but as we have here stated, the evi-
dence is such that we do not feel justified in holding con-
trary to the trial judge, and one of the opinion that the
evidence sufficiently proves the procurement of a purchase
and redemption by the defendant.

Complaint is made that there was no contract of
assignment of the business. The telegrams and the evidence
of Lusk and Rogers prove the contrary. It is argued
that the statement of Lusk does not show that there
was a contract. This is a case in the Municipal Court,

and the statement of claim quite sufficiently informed the defendant of the nature of the plaintiff's claim. Then, too, the case was fully tried and no serious question raised as to the insufficiency of the statement. It is claimed for the defendant that the contract was made with the wife of the defendant and not with him. In view of the contents of the telegrams in which it is so obvious that the defendant held himself as the principal and the owner, it certainly would be unreasonable to conclude that the suit should have been brought against her.

In our judgment there is but one important question in the case and that is the one of credibility, and upon that, as we have said, we feel convinced that we are not justified in going counter to the judgment of the trial judge.

For the reasons given the judgment will be affirmed.

AFFIRMED.

HOLDEN AND WILSON, JJ. CONCUR.

and the statement of this wife entirely false.
The statement of the nature of the plaintiff's claim.

Then, too, the case was fully tried and no error.

question raised as to the inadmissibility of the testimony.

It is claimed that the defendant had the plaintiff and

made with the wife of the defendant and not with him.

It is also claimed that the plaintiff is not in the

position to make the statement that he himself is the plaintiff.

and the court, it is certainly not in a position to make

such a statement that the wife should have been brought against her.

is not judgment there is but one important question

in the case and that is the one of credibility, and upon that,

as we have said, we feel convinced that we are not justified

in going counter to the judgment of the trial judge.

For the reasons given the judgment will be affirmed.

ATTORNEY.

WILLIAM H. WILSON, JR.

180 - 31291

O. B. JENNINGS & COMPANY,
a corporation,

Appellant,

v.

CHICAGO SLOT MACHINE EXCHANGE, INC.,
(a corporation) E. W. PAGE, ALMA
STWICKFADEN and ESTHER PAGE,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Oct. 19, 1927.

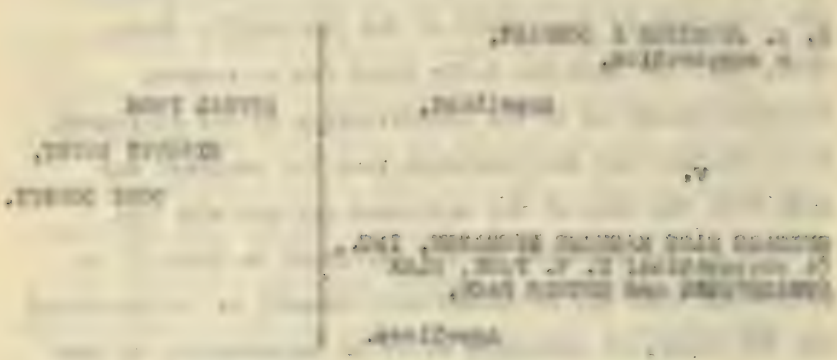
MR. JUSTICE HOLBORN delivered the opinion of
the court.

This cause has been submitted for our decision upon an abstract of the record and a brief of complainant, the defendants having failed to appear and argue the case, either orally or by a brief. No attempt has been made by any of the parties to restore or supply the missing record although every opportunity has been afforded the parties so to do.

Notwithstanding the meagreness of the assistance of counsel in presenting the cause to this court, we are constrained from the examination we have given the abstract and brief filed, by a careful perusal and study thereof, to affirm the decree entered by the learned chancellor who heard the cause in the Circuit Court.

The bill of complaint seeks to enjoin the defendants from persisting in libelling complainant and the gambling commodities which it is engaged in selling.

1987 - 1988



Opinion filed Oct. 19, 1987.

THE COURT HAS REVIEWED THE RECORD OF

This case has been submitted for my decision upon an exhibit of the record and a brief of complaint. The exhibits being filed in support and reply to the briefs. The exhibits have been made by way of the parties to review as they apply. The exhibits are although every opportunity has been afforded the parties

Notwithstanding the importance of the decision of course in presenting the case to this court, we are concerned from the evidence as have given the parties an opportunity to present their views and to reply to the views of the other party. It is the duty of the court to decide the case on the basis of the evidence presented.

The bill of complaint seeks to enjoin the defendant from violating its libeling complaint and the defendant's obligation which it is engaged in writing.

The bill sets forth that complainant is a corporation engaged in "manufacturing and selling automatic slot device vending machines, automatic slot device machines and automatic slot device weighing scales" in Chicago, and that defendant corporation for more than a year last past has been engaged in the business of selling "automatic slot device machines of various kinds, but is not engaged in the business of their manufacture, the major or principal part of its business consisting of dealing in, exchanging and selling used or secondhand slot device machines made by various manufacturers thereof", and charging defendants with in various ways and in written publications libelling the products of complainant and thereby injuring them and their business in selling the same.

It is not deemed essential in the conclusion at which we have arrived, as already indicated, to recite the evidence heard upon the trial.

The chancellor dismissed the bill for want of equity on the legal theory that complainant did not come into equity with clean hands, as demonstrated by the averments of its bill and the proofs had in support thereof. Complainant admits in arguendo that a statute entitled "An Act to prohibit the use of clock, tape, slot, or other machines or devices for gambling purposes" was in force June 21, 1895, and that this court construed said act as rendering unlawful the possession of such machines by anybody within the state, including manufacturers. See Sec. 321, Chap. 38, Cahill's 1925 Statutes. However counsel contend that that statute was repealed by construction by the Act of July 11, 1919, entitled

The bill sets forth that complainant is a corporation engaged in "manufacturing and selling automatic slot device vending machines, automatic slot device vending machines and automatic slot device vending machines in Chicago, and that defendant corporation for more than a year last past has been engaged in the business of selling "automatic slot device machines of various kinds, but is not engaged in the business of their manufacture, the major or principal part of its business consisting of dealing in, exchanging and selling used or secondhand slot device machines made by various manufacturers thereof", and stating defendants with its various ways and its various publications violating the products of complainant and thereby injuring them and their business in selling the same.

It is not deemed essential in the conclusion at which we have arrived, as already indicated, to recite the evidence heard upon the trial.

The chancellor dismissed the bill for want of equity on the legal theory that complainant did not come into equity with clean hands, as demonstrated by the events of the bill and the proofs had in support thereof. Complainant's bill is founded upon a statute entitled "An Act to regulate the use of clock, tape, slot, or other machines or devices for gambling purposes" was in force June 21, 1895, and that this court constituted said act as rendering unlawful the possession of such machines by anybody within the state, including manufacturers. See Sec. 321, Chap. 36, Cahill's 1895 Statutes. However counsel contend that that statute was repealed by amendment by the Act of July 11, 1912, entitled

"An Act to protect all counties in the State of Illinois in which there are United States Naval Stations, and military posts of the first class from slot machines and other gambling devices."

It is our judgment that the Act of 1919 in no way repealed the Act of June 31, 1895. It was simply an act passed with one object in view as stated in the title of the act, and had no reference to or effect upon the statute of 1895. We think it clear from the averments of the bill that all the parties were in pari delicto, and did not come into court with clean hands, as is required by those who appeal for relief for wrongs to a court of conscience. A special demurrer to the bill, had it been interposed, might have been sustained on that theory, as the fact of complainant endeavoring to protect its sale and manufacture of gambling devices is apparent from the averments of the bill.

The nearest case that we find, analogous to the questions before us in this case, is the one which influenced the chancellor in arriving at his decision. It is the case of American University v. Wood, 294 Ill. 186. The argument that defendants are not injured financially by the manufacture and sale of gambling devices by complainant, as set forth by the bill, is not at all pertinent to the rights of the parties here involved. The law is aimed against the manufacture and sale of gambling devices of the nature manufactured and sold by complainant, as set forth in its bill. To afford complainant the relief prayed would in effect be sanctioning its dealing in gambling devices prohibited by the statute and thereby thwarting the purpose and intent thereof. Such a statute is

10-10-68

It is our judgment that the Act of 1919 in no way repealed the Act of June 21, 1895. It was simply an act

That all the parties were in good faith, and all was done
of 1935. We think it clear from the enactment of the bill
the act, and had no reference to or effect upon the statute
passed with one object in view as stated in the title of

into many different bands, as is pointed out above the
appeal for change in a matter of knowledge.

levelness is apparent from the arguments of the bill. endeavoring to protect the sale and manufacture of gambling have been sustained on that theory, as the fact of complainant special demurrer to the bill, had it been interposed, might

The nearest case that we find, analogous to the questions before us in this case, is the one which influenced the Chancellor in arriving at his decision. It is the case of Atlantic University v. Wood, 224 Atl. 110. The statement of facts therein are not entirely identical with the facts in the present case, but the principle is the same. The Chancellor found that the law in question was not intended to prohibit the sale of gambling devices by complaint, as set forth in the bill, but that it was intended to prohibit the manufacture and sale of gambling devices at the nature manufactured and sold by complaint, as set forth in its bill. To afford complaint and the relief prayed would in effect be sanctioning the dealing in gambling devices prohibited by the statute and thereby thwarting the purpose and intent thereof. Such a statute is

of public concern, to be enforced by the courts against all parties seeking to evade its salutary provisions.

As said by the court in case supra: "As a general rule it is required that the wrongdoing or fraud of the complainant, to bar him from relief on the ground that he comes with unclean hands, must be connected with the subject of the litigation and have some relation to the rights of the parties arising out of the transaction. * * * It is true, the fraud and wrongdoing of complainant did not affect the private rights of defendants and afforded no justification in morals for their seeking to profit by exposing them, but on the ground of the public interest and policy we do not think complainant's grievance is of a character to be redressed in a court of equity. The misrepresentations of complainant in the conduct of its business affected the public, and it would seem a strange thing if a court of conscience should be required to protect a suitor in the commission of a fraud upon the public. A court of equity is a court of conscience and will exercise its extraordinary powers only to enforce the requirements of conscience. It is no part of its function to aid a litigant in the promotion of a fraud upon the public. These views find support of Primeau v. Granfield, 114 C.C.A. 549, writ of certiorari denied 225 U.S. 708; 4 A.L.R. 92, div. 6 of note; 16 Cyc.148; Manhattan Medicine Co. v. Wood, 108 U. S. 218. To our minds the principle seems so sound that we think it should be applied here even if it has not been previously applied."

of public interest, to be subject to the court's review.
All parties seeking to evade the statutory provisions.

As said by the court in *United States v. General*

rule it is required that the wrongdoing or fraud of the
complainant, to his loss, be proved on the ground that he
was an innocent party, and he must be shown to be the subject
of the litigation and have been misled in the light of the
justice arising out of the transaction. "It is to be

the fraud and wrongdoing of complainant did not affect the
private rights of defendants and afforded no justification
in morals for their seeking to profit by exposing them, but
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of a fraud upon the public. These views find support of
Pratt v. Pratt, 116 U.S. 542, 21 S. Ct. 211.

United States v. General, 116 U.S. 542, 21 S. Ct. 211; 4 A.L.R. 2d, 415, 8 of notes; 18 Cyc. 112;

Washington National Co. v. Wood, 128 U.S. 212. To our minds
the principle seems so sound that we think it should be applied
here even if it has not been previously applied.

This case is so strongly analogous to the one at bar that we would not be warranted in disregarding it, and in the faith of it the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

This case is so strongly analogous to the one at
 hand that we would not be surprised in anticipating it, and
 in the fact of it the chance of the State's being in error.

ORDER AFFIRMED.

TAYLOR, J. A. and ALLEN, A. J. JUDGES.

191 - 31323

OLGA PFEIFER, Administratrix of the
Estate of Clyde E. Pfeifer, Deceased,

Appellee,

v.

THE BELT RAILWAY COMPANY OF CHICAGO,
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 19, 1927.

MR. JUSTICE HOLBOM delivered the opinion of
the court.

This cause was submitted to the jury on the first count of a two count declaration, to which the defendant interposed a plea of the general issue. The action was a case of wrongfully causing the death of plaintiff's intestate, Clyde E. Pfeifer, who, at the time of the accident resulting in his death, was a switchman in the employ of the defendant. The action is based on the defendant's violation of the Safety Appliance Act passed by the congress of the United States in 1903, and the subsequent amendments thereof, in that defendant used and permitted to be used on the line and tracks of defendant a certain car used in moving interstate traffic which was not equipped with couplers coupling automatically by impact, and which car could not be coupled or uncoupled without the necessity of men going between the ends of the cars, and the defendant then and there used and moved on its lines in interstate traffic cars which would not couple without

THE STATE OF TEXAS, COUNTY OF DALLAS.	vs.	JOHN W. BROWN, Defendant.
JOHN W. BROWN, Plaintiff.	vs.	THE STATE OF TEXAS, COUNTY OF DALLAS.

Opinion filed Oct. 19, 1937.

MR. JUSTICE HOLMES delivered the opinion of

the court.

This cause was submitted to the jury on the

first count of a two count indictment, to which the

defendant answered a plea of not guilty. The

action was a case of wrongful death of

plaintiff's husband, John W. Brown, who at the

time of the accident was in his death, was a widow.

was in the employ of the defendant. The action is based on

the defendant's violation of the Safety Appliance Act passed

by the Congress of the United States in 1935, and the sub-

sequent amendments thereto, in that defendant used and per-

mitted to be used on the line and tracks of defendant

a car which was used in moving interstate traffic which was

not equipped with couplers coupling automatically by impact,

and which was not so coupled or uncoupled without the

necessity of men being between the ends of the cars, and

the defendant knew and there used and moved on the line

in interstate traffic cars which were not coupled without

the necessity of some man going between the ends of that car and the adjoining car for the purpose of adjusting the coupler. That on the day aforesaid, by reason of said car not being equipped with a coupler that would couple automatically by impact, without the necessity of a man going between the ends of the cars, it became and was necessary for plaintiff's intestate to go between the ends of two cars in order to make a coupling of said two cars, and he so went between the ends of said cars for said purpose, and by reason of the negligence and wrongful acts of the defendant, plaintiff's intestate was then and there caught and crushed between said two cars, and plaintiff's intestate was injured and as a result of said injuries died on the 5th day of April, 1925; also alleging and naming the defendant survivors of the intestate; alleging that they suffered pecuniary damage by reason of the wrongful death of the intestate in the sum of \$40,000.

The Chicago & Western Indiana Railroad Company was originally named a defendant, but the cause was dismissed as to it and subsequently proceeded to trial against the remaining defendant, the Belt Railway Company of Chicago.

There was a verdict of guilty with damages assessed at the sum of \$27,000. Defendant interposed motions for a new trial and in arrest of judgment, which the court overruled, and gave judgment on the verdict, to reverse which defendant prosecutes this appeal.

Plaintiff after putting in her proofs rested her case, whereupon defendant declined to offer any evidence.

The necessity of some one being between the ends of the
and the other end of the line for the purpose of signaling the
engine. That in the day of the accident, by reason of this
and being required to be a single that would require
necessarily to be injured, without the necessity of a man being
between the ends of the cars, it became and was necessary

for plaintiff's interests to be between the ends of two
cars in order to make a coupling of said two cars, and he
was between the ends of said two cars at the time
by reason of the negligence and wrongful acts of the defendant.

and, plaintiff's interests were then and there caught and
crushed between said two cars, and plaintiff's interests were
injured and as a result of said injuries died on the 23d day
of April, 1904; also alleging and stating the defendant was
aware of the interests; alleging that they suffered pecuniary
damage by reason of the wrongful death of the interests in

the sum of \$40,000.

The Chicago & Western Indiana Railroad Company was
originally named a defendant, but the same was dismissed as
to it and subsequently proceeded to trial against the defendant
and defendant, the Chicago & Western Indiana Railroad Company.

There was a verdict of guilty with damages assessed
at the sum of \$40,000. Defendant answered motions for a
new trial and in support of judgment, and the court overruled,
and gave judgment on the verdict, to reverse which defendant

presented this appeal.

Plaintiff's motion for a new trial was denied and the court affirmed the
verdict and judgment and the court affirmed the

The cause went to the jury on the uncontradicted proofs of plaintiff.

Defendant alleges for reversal errors in admission of evidence, erroneous rulings of the court on motions, failure of the court to instruct the jury on the motions of the defendant to find the defendant not guilty, and improper remarks of counsel.

The crucial question for solution here is, - Does the evidence show, with all reasonable inferences to be drawn therefrom, that the car which the intestate was attempting to couple when he met his death was equipped with couplers coupling automatically by impact and which could be coupled without the necessity of men going between the ends of the cars, as provided by Section 2 of the Federal Safety Appliance Act?

The sole witness, who testified regarding the accident, was Perry Thurber, who at the time of the accident was a switchman in the employ of the defendant. He testified at the instance of the plaintiff. Thurber at the time of the accident was a member of a switching crew working on tracks adjoining the track on which plaintiff's intestate was engaged in coupling cars. Thurber was working on track No. 36, and plaintiff's intestate was working on track No. 37, which was north of 36. On the track on which deceased was working an engine was attached to a train of cars to the west. He was walking from east to west making couplings wherever he found the cars were not coupled together. He gave signals to the engineer directing the movement of the cars; that the

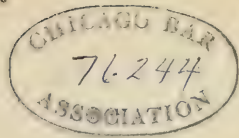
deceased was doing practically the same work on track 37, the only difference being that there was no engine on Thurber's cars. At the time of the accident deceased had coupled up fifteen cars. There is no dispute but that the cars were engaged in interstate commerce. The cars that deceased was engaged in coupling at the time of the accident were a tank car and a box car between which he was crushed, and as a result thereof died within fifteen minutes thereafter.

There was no eye witness to the accident. Thurber responded to an outcry of deceased, went to his assistance and found him caught between the tank and the box car. Thurber gave the engineer the signal to go ahead, which he did and thereby released the body of plaintiff's intestate.

Thurber in describing the drawbar on the box car said that it was attached to draft timbers under the car and had a lateral or side motion giving it about two inches play on each side of the draw bar. In making a coupling the first movement is to raise the lifting lever; that releases a lock on the inside; the next thing is to adjust this draw bar in a line with the draw bar that is going to be coupled onto, if it is out of line; that is done by the movement of the draw bar from one side to the other. If a draw bar of this kind ^{that} was on this box car would be moved as far as the mechanism would permit it to move to one side or the other, the coupling could not be made without a movement of the draw bar on a line with the other draw bar; it has to center. On this box car there was no appliance

the only difference being that there was no engine on
Towhee's car. At the time of the accident Towhee had
coupled up fifteen cars. There is no dispute that the
cars were coupled in accordance with the rule. The rule
stated was coupling at the end of the train
and a full set had a full set of cars which it was
coupled up with the engine. The cars were coupled
up with the engine. The cars were coupled up with the
engine. The cars were coupled up with the engine.

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that could be used for moving the draw bar and getting it in proper alignment that could be done outside of the car; that to move that kind of a draw bar it has to be forced over either by prying it over or kicking it over, something to move it; that there was about two inches play on each side of the draw bar, allowing the draw bar to move a short distance, about two inches on each side; that in making a coupling on couplers of this character the first movement is to raise a lever on the timber; that the next thing is to adjust this draw bar to a line with the draw bar that you are going to couple it on to if it is out of line; this is done by the movement of the draw bar to one side or the other; that the method provided for moving this kind of a draw bar was to move or force it over, either by prying it over, kicking it over, something to move it over; that the draw bar weighed between 200 and 300 pounds; that the coupler on the tank car was substantially the same as that on the box car, the pin lifter being a little different. And this witness further testified that there was no appliance to his knowledge that could be used for moving the draw bar and getting it in proper alignment that could be done outside of the car, and that there was no means of getting a draw bar which was out of alignment back to center except for a man to go between the ends of the car and force it over by prying it or kicking it.

After the accident the witness Furber returned to the cars and coupled up the box car and the tank car, the cars which deceased was endeavoring to couple when he came to his death.



15

that could be used for moving the draw bar and getting it
in proper alignment that would be done outside of the car
that to move that kind of a draw bar it has to be moved
over either by prying it over or lifting it over, some-
thing to move it; that there was about two inches play on
each side of the draw bar, allowing the draw bar to move
a short distance, about two inches on each side; that in
making a coupling on a complete of this character the first
movement is to raise a lever on the timber; that the next
thing is to adjust this draw bar to a line with the draw
bar that you are going to couple it on so it is out of
line; this is done by the movement of the draw bar to one
side or the other; that the method provided for moving this
kind of a draw bar was to move or turn it over, about by
prying it over, lifting it over, something to move it over;
that the draw bar weighed between 500 and 600 pounds; that
the coupler on the back car was substantially the same as
that on the box car, the pin lifter being a little different.
And this witness further testified that there was no appliance
to his knowledge that could be used for moving the draw bar
and getting it in proper alignment that could be done outside
of the car, and that there was no means of getting a draw bar
which was out of alignment back to center except by a man
to go between the ends of the car and turn it over by pry-
ing it or lifting it.

After the witness the witness further testified

to the manual coupling up the box car and the tank car,
the cars which decreased and understanding to couple when he
came to his death.

This testimony of Thurber was objected to on the ground substantially that some change might have occurred between the time of the accident and Thurber's return and coupling up the cars. We think that a sufficient answer to this objection is that if there had been any change, the instrumentality being solely in the hands and under the control of the defendant, it could easily have so proven. This evidence of Thurber was the best obtainable and of course was subject to contradiction by defendant.

It is true that to the material portions of this testimony the court sustained an objection against the protest of plaintiff's counsel. As this court said in Erickson v. Svate, 200 Ill. App. 151, "Where a party prevents proof by his objection, or procures its exclusion, he cannot object that such a fact is not proved. Hahl v. Brooks, 213 Ill. 134; Hepler v. Peoble, 225 Ill. 275; Owen v. Grumbaugh, 228 Ill. 389. Therefore this case must be treated as if appellee made the proof which she sought to make."

When the defendant moved for an instructed verdict, the evidence regarding the draw bar and the coupler was such, that uncontradicted, the jury might reasonably conclude that the coupler would not couple automatically by impact and not at all without deceased going between the cars to handle the draw bar to bring it in alignment with the coupler to make the coupling, and that in so doing deceased met with the injury that resulted in his death. They might so find from the evidence and the envisioning circumstances, in the absence of countervailing proof.

This testimony of Thurston was objected to as the
evidence substantially that a change might have occurred
between the time of the accident and Thurston's return and
implying of the case. He thinks that a sufficient answer
to this objection is that if there had been any change,
the substantially being only in the facts and not
the control of the defendant, it would really have no effect.
This evidence of Thurston was the best obtainable and of
course was subject to contradiction by defendant.

It is true that to the material portions of this
testimony the court sustained an objection against the
fact of defendant's recovery. In this court will in Harmon
at 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

When the defendant moved for an instructed verdict,
the evidence regarding the fire and the accident was
such, that notwithstanding, the jury might reasonably con-
clude that the accident would not occur automatically by
light and not at all without deceased going between the
cars to handle the door way to bring it in alignment with
the car to make the coupling, and that in so doing
deceased was with the injury that resulted in his death.
They might as well have the evidence and the surrounding
circumstances, in the absence of convincing proof.

Defendant rested its case on the proofs of plaintiff and is bound by the record as he left it. By denying defendant's motion for an instructed verdict, the court in legal effect held that there was sufficient evidence adduced by plaintiff to warrant the jury in finding a verdict in plaintiff's favor, and in this we concur and hold that in denying defendant's motion to instruct a verdict in its favor there was no error.

While it is true there is no direct evidence as to why the deceased went between the cars, still from all the evidence adduced by plaintiff, including the evidence erroneously excluded by the trial judge, with all reasonable inferences to be drawn therefrom, the jury were justified in concluding that the deceased came to his death by necessarily going between the box and the tank car to make the coupling for the reason that the coupling could not be made automatically by impact. As said in Myers v. Pittsburgh Coal Co., 233 U.S. 184; "In our opinion the trial court properly left the question to the jury upon testimony which when fairly considered might sustain the verdict." Reasonable men in considering the proofs might conclude that deceased necessarily went between the cars for the purpose of moving over the draw bar to make the coupling. All that was necessary, for the jury to draw the inference that deceased went between the cars for the purpose of moving the draw bar, was that "the circumstances must be logically such that the jury may deduce the fact from them by some process of human reasoning." (1 Moore on Facts, Sec. 598.) Overstreet v. Norfolk St. Ry. Co., 338 Fed. Rep. 565, was a case in which the trial court directed a verdict for defendant. In re-

inferred from the facts on the record of plaintiff and is
found by the jury as he left it. By denying defendant's
motion for an instruction, the court in legal effect
held that there was sufficient evidence shown by plain-
tiff to warrant the jury in finding a verdict in plaintiff's
favor, and in this he was wrong and held that in denying defendant's
motion to instruct a verdict in his favor there was
an error.

While it is true there is no direct evidence as
to why the deceased went between the cars, still from all
the evidence adduced by plaintiff, including the evidence
adduced by the State, the jury were justified
in inferring that the deceased came to his death by
falling in consequence of the deceased coming between the cars
and the fact that the coupling was not so
tight as to prevent the cars from moving.

It is true that the jury were not told that the
coupling was not so tight as to prevent the cars from
moving, but the question to the jury upon testimony which
when fairly considered might sustain the verdict. The
evidence in connection with the facts might convince the jury
that the deceased went between the cars for the purpose of
moving over the track but to make the coupling. All that was
necessary for the jury to draw the inference that deceased
went between the cars for the purpose of making the coupling
was that the circumstances were so logically such that the
jury may deduce the fact from them by some process of human
reasoning. It is true that the jury were not told that the
coupling was not so tight as to prevent the cars from
moving, but the jury were not told that the coupling was not
so tight as to prevent the cars from moving. It is true that
the jury were not told that the coupling was not so tight as to
prevent the cars from moving. It is true that the jury were not
told that the coupling was not so tight as to prevent the cars
from moving. It is true that the jury were not told that the
coupling was not so tight as to prevent the cars from moving.

versing the action of the court, the circuit court of appeals said: "We are of the opinion, after painstaking study of the testimony, that enough was shown on behalf of the plaintiff to warrant submission to the jury, and it was therefore error to direct a verdict for the defendant." (Citing numerous cases to sustain this dictum of the court.) See also Donagan v. Baltimore & N.Y. Co., 165 ibid. 869.

We find nothing improper in the argument of counsel for plaintiff either to the jury or to the court in support of any motions made during the trial. He had a right to argue from the evidence the question of the misalignment of the draw bar, and to give the jury his view of what the evidence in his opinion proved on that question. Neither was it reversible error to prove the expectancy of life of deceased at the time he set his death through the couplers, between the box and the tank car, not being in such condition as to enable them to be coupled automatically by impact. The couplers on the end of the tank and box cars being in the condition in which they were proven to be at the time of the accident to deceased, was a violation of the Federal Safety Appliance Act, supra.

We do not find any error in the admission of evidence on the part of plaintiff, although as above pointed out, relevant evidence proffered by plaintiff was erroneously rejected at the instance of defendant.

The rights of the defendant under the law were preserved to it in the trial of the case, and we find no merit in the contention of defendant, that in the trial court it was denied the equal protection of the laws in violation of the fourteenth amendment to the constitution of the United States or that the judgment entered against it on the verdict of the jury was in derogation of its rights under the Federal Employers Liability and Safety Appliances Act, or that the defendant thereby was deprived of its property without due process of law.

The trial in the superior court was fair and in accord with the law, and as we fail to find any error of a reversible nature in the record before us, the judgment of the superior court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

The right of the defendant under the law
was preserved so it is in the trial of the case, and so
that we must in the question of defendant, that is
the trial must be as before the jury presiding at
the trial in violation of the defendant's rights so
the constitution of the United States or that the judgment
entered against it on the verdict of the jury was in
violation of its rights under the Federal Habeas
Corpus and habeas corpus Act, or that the defendant
and the government have violated the property rights of the
defendant.

The trial in the execution court was fair and in
accord with the law, and so we will not find any error of
a reversible nature in the record before us, the judgment
of the execution court is affirmed.

WITNESSETH.

THOMAS J. ANDERSON, J. CLERK.

310 - 31442

SAMUEL WENIG,

Appellee,

v.

CHARLES MATLIN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. JUSTICE HOLBOM delivered the opinion of the court.

In the Municipal Court on a trial before a judge thereof without a jury, plaintiff had judgment for \$1129.13, to reverse which defendant prosecutes this appeal.

This action arises out of a joint enterprise in the building of a garage, plaintiff selling his interest in said garage enterprise to the defendant for, as he claims, the sum of \$14,126.15. Defendant contended that the contract was for \$13,000. On December 24, 1924 defendant paid plaintiff \$6,000, and on January 10, 1925 paid him \$7,000, and on the \$7,000 check evidencing the payment there was endorsed: "Paid in full as per agreement in Dale-Dewey garage transaction." At the time of sending the \$7,000 check to the plaintiff the defendant left for California and remained away from Chicago more than a month.

Defendant, when he sent the \$7,000 check to the plaintiff, knew that plaintiff needed the money, and according to his own evidence he knew that he owed more than the amount of that check. There is nothing in the evidence to

indicate that there was any talk or argument between the parties disputing the amount claimed by the plaintiff. Plaintiff erased the endorsement on the check and collected the amount of it through his bank. Defendant's contention is that the receipt of the check with the accompanying endorsement thereon and the collection thereof constituted in law an accord and satisfaction. He further contends that his defense is sustained by a preponderance of the evidence. However, the trial being before the judge without the intervention of a jury, it was the province of the judge to weigh the evidence, and to decide from the testimony on which side was the greater weight or preponderance of the proof.

It seems clear on defendant's own evidence that \$128.13 more than the amount of the \$7,000 check was at the time of sending the check due to plaintiff, consequently there could be no accord and satisfaction in law because the elements which constitute an accord and satisfaction were entirely lacking. It was for the court to determine the weight of the evidence. A greater number of witnesses does not in itself constitute a greater weight of the evidence. The question for the court is the weight of the believable evidence and its probative force. The virtual admission of defendant that there was more than \$7,000 due plaintiff at the time he sent the \$7,000 check destroys his contention that there was an accord and satisfaction by receipt of the check with the endorsement thereon, as from his own evidence he sent less than the amount he knew to be due. A careful reading of the evidence of all the

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indicates that there was any link or argument between the
parties involved the same should be the plaintiff.
plaintiff cannot be concerned in the case and will not
the case of it through his hands. Defendant's contention
is that the receipt of the check with the accompanying
endorsement thereon and the collection thereof constituted
in law an accord and satisfaction. No further contents
that this defense is sustained by the presentation of the
evidence. However, the trial judge before the judge without
the intervention of a jury, it was the province of the judge
to weigh the evidence, and to decide from the testimony on
which side was the greater weight or preponderance of the
proof.

It seems clear on defendant's own evidence that
firstly more than the amount of the \$7,000 check was at the
time of making the check due to plaintiff, consequently
there could be no accord and satisfaction in law because
the elements which constitute an accord and satisfaction
were entirely lacking. It was for the court to determine
the weight of the evidence. A greater number of witnesses
does not in itself constitute a greater weight of the
evidence. The question for the court is the weight of
the believing evidence and its relative force. The
virtual admission of defendant that there was more than
\$7,000 due plaintiff at the time he sent the \$7,000 check
destroys his contention that there was an accord and satis-
faction by receipt of the check with the endorsement thereon,
as from his own evidence he can see that the amount he knew
to be due. A careful reading of the evidence of all the

witnesses impels us to the conclusion that the learned trial judge was justified in holding from the evidence that the preponderance thereof was as contended by the plaintiff. In a similar case of a contrariety of witnesses the court said in Schroeder v. Walsh, 120 Ill. 403: "This equilibrium may be destroyed by surrounding circumstances."

The learned trial judge undoubtedly concluded from the conduct of defendant in sending the check for \$7,000 and then departing from the state and remaining away more than a month was intended to lure the plaintiff into receiving and collecting the check, and thereby raise the question of accord and satisfaction. And as said by the court in Conway v. City of Chicago, 219 Ill. 295, so we say here: "We do not agree to the contention that because two witnesses testified one way upon the main fact and two witnesses another, there was not or could not be a preponderance of the evidence. The evidence is weighed not counted, and where the court has before it witnesses testifying in a cause, there are many things that enter into consideration in determining the weight of the testimony and reaching the conclusion upon the question of a preponderance." We think this case sustains the conclusion at which the court arrived on the weight of the proof.

In People v. Pfuhl, 275 Ill. 243, the court said: "If there appears to be inherent evidences of the truth of one statement and the contradictory statement is unreasonable or carries with it suspicion, doubt and disbelief as

witnesses impeach us as the conclusion that the learned trial judge was justified in holding from the evidence that the preponderance thereof was as contended by the plaintiff. In a similar case of a majority of witnesses the court said in Robinson v. Lusk, 180 Ill. 403; "This conflict may be destroyed by surrounding circumstances."

The learned trial judge undoubtedly concluded from the conduct of defendant in running the check for \$7.00 and then departing from the state and remaining away more than a month was intended to leave the plaintiff into trouble and collecting the check, and thereby raise the question of account and satisfaction. And as said by the court in Conroy v. West of Chicago, 213 Ill. 305, so we say here: "It is not true in the construction that because two witnesses testified one way upon the main fact and two witnesses testified the other way that we should not weigh the evidence of the witness. The evidence is weighed and tested, and where the court has before it witnesses testifying in a cause, there are many things that enter into consideration in determining the weight of the testimony and reaching the conclusion upon the question of a preponderance." The trial judge was within the conclusion at which the court arrived on the weight of the proof.

In People v. Smith, 213 Ill. 305, the court said: "If there appears to be inherent weakness of the truth of one statement and the contradictory statement is unimpaired or arrives with it unimpaired, doubt and disbelief as

to its sincerity and truth, it would be entitled to little or no credit and weight." And we think the trial judge was justified in treating the evidence of defendant as unreasonable, and with doubt and disbelief as to its sincerity and truth.

There is no evidence in this record which would warrant holding as a matter of law that the \$7,000 check with its endorsement, constituted an accord and satisfaction, for defendant testified: "Wenig and I never had any dispute what was going or coming and the first time I knew that there was any dispute at all was when I got the check for \$7,000.00 back from the bank and the writing on the back scratched off."

In Ostrander v. Scott, 161 Ill. 339, the court said: "The authorities are numerous and uniform that a payment of a part of a fixed and certain demand which is due and not in dispute is no satisfaction of the whole debt, even where the creditor agrees to receive a part for the whole and gives a receipt for the whole demand." * * * This doctrine rests upon the ground that the agreement for a discharge of the entire debt is without consideration. But it is limited to cases where the debt is of the character stated."

The doctrine of accord and satisfaction is well stated in Corpus Juris. Vol. 1, page 558, in the following language: "Where the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof,

be the plaintiff and there, it seems to me, is no issue
or no credit and weight. And we think the trial judge
was justified in treating the evidence submitted as
unreliable, and with doubt and hesitation as to its
admissibility and weight.

There is no evidence in this record which tends
to warrant holding as a matter of law that the \$7,000 check
with its endorsement, constituted an account and satisfaction,
for defendant testified: "Henry and I never had any dis-
pute what was going on, and the first time I know
that there was any dispute at all was when I got the check
for \$7,000.00 back from the bank and the writing on the
back scratched off."

In defendant's brief, Vol. 11, p. 508, the court

said: "The authorities are numerous and uniform that
a payment of a part of a fixed and certain demand which is
due and not in dispute is no satisfaction of the whole
debt, even where the creditor agrees to receive a part
for the whole and gives a receipt for the whole demand."
This doctrine is well settled. For a discharge of the entire debt is without considera-
tion. But it is limited to cases where the debt is of
the character stated."

The doctrine of account and satisfaction is well
settled in Oregon law. Vol. 11, page 508, in the follow-
ing language: "Where the debt or demand is liquidated or
certain and is due, payment by the debtor and receipt by
the creditor of a less sum is not a satisfaction thereof."

although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given."

We see no good reason for reversing the judgment of the trial court, and it is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

It, however, as it appears of course, that the
entirety of the work is to be done by the
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368 - 31500

ROGER E. APPELYARD,

Appellee,

v.

HARRY C. STUART, et al On appeal
of FARMERS & MERCHANTS BANK OF
LELAND, ILLINOIS,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 19, 1927.

MR. JUSTICE HOLBOM delivered the opinion
of the court.

On February 24, 1923, Roger Appleyard, as complainant, filed his bill to foreclose a trust deed made by Harry C. Stuart and wife to Homer H. Schneider, trustee, conveying certain premises in Chicago, to secure a principal indebtedness of \$12,000. The appellant, Farmers & Merchants Bank of Leland, Illinois, was made a defendant as the holder of an indebtedness secured by trust deed made by the Stuarts to Homer H. Schneider on March 9, 1923, to secure an indebtedness of \$2,000, and which last named trust deed was subject and subordinate to the lien of the trust deed to Homer H. Schneider, trustee, sought to be foreclosed in the bill of Roger E. Appleyard.

The major provisions of the trust deed to Schneider were set out in the Appleyard bill. The Stuarts were non-residents of Illinois, so that no personal service could or was had on them, and in consequence thereof there could be

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Opinion filed Oct. 19, 1907.

MR. JUSTICE REASON delivered the opinion

of the court.

On January 14, 1907, after argument, an order was

made, filed his bill to foreclose a trust deed made by Harry

A. Smith and wife to Harry E. Smith, trustee, conveying

certain premises in Chicago, to secure a principal indebted-

ness of \$12,000. The appellant, Harry A. Smith, son of

Edward, Illinois, was made a defendant on the basis of an

instrument executed by trust deed made by the trustee to

Edward H. Smith on March 2, 1902, to secure an indebted-

ness of \$2,000, and which last named trust deed was subject

and subordinate to the lien of the trust deed to Edward H.

Smith, trustee, sought to be foreclosed in the bill of

Edward H. Smith.

The major provisions of the trust deed to Harry

was not in the Chicago bill. The trustee was non-

resident of Illinois, so that no personal service could be

made on him, and in consequence thereof there could be

no personal judgment against them in the foreclosure suit.

Under the provisions of the trust deed complainant prayed for the appointment of a receiver to collect the rents, etc. on filing the bill. Subsequent to the filing of the bill a decree of foreclosure was entered, which decree inter alia found that it was provided in said trust deed:

"Third - That * * *, the said Harry C. Stuart and Florence J. Stuart, his wife, conveyed to Homer H. Schneider, as Trustee, the following described real estate, to-wit * * * together with all rents, issues and profits of said premises, * * * released and waived * * * all right to retain possession of said premises after any default in payment, etc., and that upon the filing of a bill to foreclose said trust deed a receiver might be appointed with the usual powers and duties of receivers in Chancery."

A sale was had under the decree and the master making the sale in his report of sale showed a deficiency between the amount due complainant and the sum realized at the sale of \$3467.85. In approving the master's report of sale the court found that the grantors in the trust deed foreclosed conveyed the premises described in said trust deed and said master's report, together with all rents, issues and profits of said premises, as security for the indebtedness due the complainant, and that it was further provided in said trust deed that upon default the legal holder or owner of the notes described in said bill of complaint and trust deed, or the trustee should have the right to immediately foreclose said trust deed, and that upon the filing of a bill to foreclose said trust deed a receiver might be appointed with the usual powers of a receiver in chancery, and especially with power to collect

Under the provisions of the trust deed mentioned
and entered for the appointment of a receiver to collect
the rents, etc. on filing the bill. Subsequent to the fil-
ing of the bill a number of assignments were assigned, and
therefore inter alia found that it was provided in said trust
deed:

"That - First - 'I, the said Harry A. Brown,
do hereby assign, sell, convey and transfer to Harry
A. Brown, as trustee, the following personal
real estate, to-wit: 'I, the said Harry A. Brown,
do hereby assign, sell, convey and transfer to Harry
A. Brown, as trustee, all my right in and to the
undivided interest after and subject to payment, etc.,
and that upon the filing of a bill to foreclose
said trust deed a receiver shall be appointed with
the usual powers and duties of receivers in Germany.'"

A note was then given and the same was the subject
being the note in his hands at this time a bill was
between the court and complainant and the same resulted in
the sale of \$2000.00. In approving the master's report of
sale the court found that the proceeds in the trust deed
remained conveyed the proceeds described in said trust
deed and said master's report, together with all costs,
fees and profits of said business, as security for the
indebtedness and the complainant, and that it was further
provided in said trust deed that upon default the legal
holder or owner of the notes described in said bill of
complaint and first deed, or the trustee should have the
right to immediately foreclose said trust deed, and that
upon the filing of a bill to foreclose said trust deed
a receiver might be appointed with the usual powers of a
receiver in Germany, and especially with power to collect

the rents, issues and profits of said premises during the pendency of such foreclosure suit and until the time to redeem from any sale that may be made under any decree foreclosing said trust deed shall expire; and it was further ordered that W. F. Conlon, "heretofore appointed receiver of the premises foreclosed herein, shall continue to act as such receiver for said premises until the further order of this court."

The receiver's report showed a balance of \$4,071.87, available for distribution after the payment of all receiver-ship expenses, and thereupon the court entered the following order:

"And now coming on to be heard the written motion of Roger E. Appleyard, complainant herein, that William F. Conlon, the receiver heretofore appointed by this court for the premises described in said bill of complaint, be directed to pay to complainant the sum of \$3467.85 found due him under the order entered by this court on the 22nd day of December, 1924, with interest from such date."

And Conlon as such receiver be ordered and directed to pay the last mentioned amount to complainant Appleyard "in payment of the deficiency found due the complainant." From that order this appeal is prosecuted by Farmers & Merchants Bank of Leland, Illinois.

It is contended by the appellant bank that it was error in the court in directing the application of the rents collected by the receiver during the pendency of the suit and during the period of redemption, because complainant had no lien thereon; that the cause of action based on his mortgage was merged in the decree of fore-

the President's party was a success in 1917.

the water surface by the waves on the beach and by the wind, also increased from time to time.

Detachable has been used as evidence in this case.

It is recommended by the applicant that there be no error in the amount in assessing the application of the same collected by the receiver during the period of the suit and during the period of redemption, because complainant had no lien thereon; that the owner of action named on this mortgage was wronged in the matter of taxes

closure which did not reserve a lien on the rents, and that no deficiency decree was rendered against the mortgagors or against any one, so that complainant was not entitled on motion to the rents in the hands of the receiver, and that the appellant bank is entitled to such rents to pay its claim under its note and trust deed.

The appellant bank further contends that the express lien on the rents and profits is neither averred in the bill of complaint, nor found by the decree, and there is no deficiency decree against any one and consequently complainant is not entitled to any of the rents in the hands of the receiver.

If the contentions of the appellant bank were well taken on the questions of fact stated, there could be no difficulty in solving these questions in favor of the appellant bank, but unfortunately for these contentions, they are not sustained in any wise by the record. Complainant Appleyard's trust deed not only pledged the land as security for the indebtedness, but also the rents, issues and profits arising from the mortgaged premises from the time of the commencement of the foreclosure proceedings until the expiration of the time of redemption. Therefore complainant had two funds to look to for the payment of his claim, the land being the principal security, and the rents a secondary security. When from the sale of the mortgaged premises the amount due failed to be realized and proved inadequate for that purpose, then complainant had the right to have recourse upon the rents collected through the

It is not necessary to list the names of the persons who have been admitted to the society, but it is necessary to list the names of the persons who have been expelled from the society. The names of the persons who have been expelled from the society are as follows: [List of names]

The question of the admission of new members to the society is a matter of great importance. It is necessary to have a system of admission which will ensure that only persons of good character and high moral standards are admitted to the society. The system of admission should be based on the following principles: [List of principles]

If the members of the society are to be of any use, they must be of good character and high moral standards. It is necessary to have a system of admission which will ensure that only persons of good character and high moral standards are admitted to the society. The system of admission should be based on the following principles: [List of principles]

receiver during the period of redemption.

The authorities relied upon by the appellant bank would sustain their contentions as to the law if the facts upon which the law is predicated were sustained by the proofs. A sale of the land under the trust deed exhausted defendant's rights thereunder as to the land, but as his debt had not been fully paid by the sale, he had a right to resort to the rents collected through the receiver during the period of redemption. It is a dual security.

It appeared from the averments of the bill, the trust deed being incorporated therein, that the mortgaged premises "together with all rents, issues and profits of said premises * * * (were pledged as security) hereby releasing and waiving all right to retain possession of said premises after any default in payment or breach of any of the covenants or agreements herein contained." The bill further averred that "upon the filing of a bill for that purpose the court in which such bill is filed may at once and without notice to the grantors or any one claiming through or under them, appoint a receiver with the usual powers of receivers in chancery, and especially with power to collect the rents, issues and profits of said mortgaged premises during the pendency of such foreclosure suit and until the time to redeem from any sale that may be made under any decree foreclosing this trust deed shall expire;" and the bill likewise prayed "that a receiver may be appointed upon the filing of this bill of complaint with the

receiver during the period of redemption.

The committee called upon the receiver

and was told that the receiver was in the line of

the law and that the law is not to be

defied by the receiver. A sale of the land under the trust

had been made and the rights of the receiver as to the

land, but as the debt had not been fully paid by the

receiver, he had a right to resort to the trust collected

through the receiver during the period of redemption.

It is a dual security.

It appeared from the statement of the bill, the

trust deed being incorporated therein, that the mortgage

promises "together with all rents, issues and profits of

said premises" (were pledged as security) hereby

collecting and paying all that is due to the receiver of

said premises after any default in payment or breach of

any of the covenants or agreements herein contained.

The bill further stated that "upon the filing of a bill

for that purpose the court in which such bill is filed

may at once and without notice to the receiver on any day

appointing through or under whom, appointing a receiver with

the usual powers of receivers in chancery, and especially

with power to collect the rents, issues and profits of

said mortgaged premises during the pendency of such force

of law and until the time to redeem from any such bill

may be made under any decree for collecting this trust deed shall

expire; and the bill likewise prayed "that a receiver may be

appointed upon the filing of said bill of complaint with the

usual powers of receivers in chancery, and under and in accordance with the terms of the trust deed being foreclosed, to take immediate possession of said premises and to receive and to operate, manage and lease the said premises, and receive and collect the rents, issued and profits therefrom during the pendency of this suit and until the several amounts due orator with interest thereon with interest at 6% from the date of said decree may be paid."

At the foreclosure sale the land only was sold but the secondary security, the rents, was not sold, and therefore there was no merger of one security with the other.

What was said in First National Bank v. Steel Co., 174 Ill. 140, is equally applicable to the facts in the instant case. There the court said:

"It could not be ascertained until after the sale whether there would be a deficit requiring the appointment of a receiver to collect the rents and profits during the time of redemption. Under the decree of foreclosure the property described in the mortgage was sold. The rents and profits to accrue during the period of redemption were not sold and no order could be entered until it was ascertained at the foreclosure sale that the mortgaged premises were insufficient to pay the indebtedness evidenced by the mortgage. " " " Here the receiver was properly appointed after the foreclosure decree and sale, as the security of the steel company was not exhausted by the sale. Moreover, the necessity for the appointment of a receiver and the collection of the rents and profits and their application to the payment of the deficiency did not appear until after the foreclosure decree and sale."

In Haas v. Chicago Building Society, 89 Ill. 498, the court held, as we hold here, that the necessity for the application of the rents in payment of the mortgage debt may usually not appear until after decree and sale, which

actual receipt of proceeds in cash, and under such
 accordance with the terms of the trust deed being fore-
 closed, to take immediate possession of said premises
 and to receive and to operate, manage and lease the said
 premises, and receive and collect the rents, issues and
 profits thereon during the term of the said lease and
 until the same is renewed or extended by mutual agreement
 with the tenant at 60 days from the date of said lease may be paid.
 As the foreclosure sale the land only was sold and
 the secondary security, the rents, was not sold, and therefore
 there was no surplus of the proceeds over the debt.

There was said in First National Bank v. First Nat.

174 Ill. 121, is equally applicable to the facts in the in-
 stant case. There the court said:

"It could not be ascertained until after the sale
 whether there would be a surplus resulting from the sale-
 ment of a receiver to collect the rents and profits
 during the term of redemption. Hence the decree in
 foreclosure the property described in the mortgage
 was sold. The rents and profits were to be paid during the
 term of redemption were not sold and no other would
 be entered until it was ascertained at the foreclosure
 sale that the mortgage proceeds were insufficient to
 pay the indebtedness evidenced by the mortgage."
 Here the receiver was expressly appointed after the fore-
 closure decree and said, as the trustee of the trust
 company was not authorized by the sale, however, the
 necessity for the appointment of a receiver and the
 collection of the rents and profits and their applica-
 tion to the interest of the debenture did not arise
 until after the foreclosure decree and sale."

In Bank v. Chicago Building Society, 89 Ill. 499.

the court held, as we held here, that the necessity for the
 application of the rents in payment of the mortgage debt
 may usually not appear until after foreclosure and sale, when

is the same in the instant case. The amount of the deficiency did not appear until after the master's report of sale came in, and as the court in case supra said: "If an appropriation of the rents on the indebtedness is justified by the surrounding facts before sale, we see no good reason why the same and more weighty facts existing after the sale may not warrant a similar procedure. The security, plainly, is not exhausted by the sale, for there is a fund included in it which is secondarily liable. It is true, the mortgagee has elected to foreclose and sell; but then he has pursued that remedy to the end and without getting satisfaction of this debt, and he may avail himself of any just and equitable means of collecting the residue. * * * We hold, then, both upon the principles of equity that lie at the foundation of the chancery court, and upon authority, a receiver may sometimes be allowed after decree and sale, and that a mortgagee does not, in all cases, exhaust his security by a foreclosure and sale."

The facts in the case at bar are consonant with this judicial dicta.

Orsley v. Heaven, 179 Ill. App. 61, contains all the material elements present in the record before us.

In Schaepfi v. Bartholomae, 217 Ill. 105, the court decided that when the lien of the trust deed is enforced by a sale of the property, the mortgage or trust deed had expended its full force and that the property is no longer subject to its provisions, but in recognizing the distinction between lands and rents the court said: "If however, the premises were inadequate security, the person liable to pay

is the fact in the instant case. The amount of the
delinquency did not appear until after the master's report
of sale was in, and as the court in one case said:
"It is a representation of the facts on the indebtedness in
vestigation of the indebtedness that before said, we see
no good reason why the same and more weighty facts unless
ing after the sale and without a similar procedure.
The security, plainly, is not intended by the sale, for
there is a fund included in it which is considerably liquid.
It is true, the mortgagee has elected to foreclose and sell;
but then he has promised that remedy to the end and without
any intention of not doing so, and he has been allowed
of any such and equitable means of collecting the principal.
... as said, there, with the same intention as
that he at the foundation of the security, and upon
authority, a receiver may sometimes be allowed after notice
and sale, and that a mortgagee does not, in all cases,
exercise his power by a foreclosure and sale.

The facts in the case at bar are consistent with this
intended result.

Quincy v. Quincy, 173 Ill. App. 51, contains all the
material elements present in the record before us.

In Quincy v. Nicholson, 217 Ill. 322, the court
decided that when the lien of the trust deed is enforced by
a sale of the property, the mortgagee is bound and had regard
of the full force and that the remedy is no longer subject
to his provisions, but is recognizing the distinction and
between the two cases and that the court said: "It is clear, the
provision were made by the security, the person liable to pay

the indebtedness insolvent, the person in possession of the premises committing waste, or equitable grounds were shown and any part of the decree of foreclosure was not satisfied by the sale, the court in which the foreclosure suit was pending might, through a receiver and not otherwise, appropriate the rents, issues and profits arising from the premises during the period of redemption for the purpose of paying the portion of the indebtedness which was not satisfied by the sale of the premises. * * *

There was no objection to the continuation of the receiver after the sale. His appointment was continued for one purpose and one purpose only, viz., to collect the rents of the mortgaged premises during the period of redemption, which rents should be applied as they were less the expenses of the receivership, to the payment to complainant of the difference between the amount found due him by the decree, and the amount for which the property was sold at the master's sale.

Such was the procedure in the decree appealed from and we hold that in it there was no error, and therefore the decree appealed from is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

383 - 31515

ADVANCE MILL AND LUMBER COMPANY,
a corporation,

Appellee,

v.

WOODWORKERS TOOL WORKS, INC.,
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

Opinion filed Oct. 19, 1927.

MR. JUSTICE HALDORN delivered the opinion
of the court.

This action is trover, a survival of the fiction of the common law, averring that on the 15th day of August, 1924, plaintiff was lawfully possessed of certain property set forth in the declaration, and being so possessed, lost the same, and that same came into the possession of the defendant by finding. The losing and finding part of the declaration is fiction, the fact being that in these actions where the plaintiff succeeds, the defendant wrongfully seized the personal property in dispute and converted the same to his own use. That is what occurred in the case at bar.

The cause was tried by the judge without the intervention of a jury by agreement of the parties. The court, after a full hearing, found the defendant guilty, and assessed plaintiff's damages at the sum of \$250. After making motions for a new trial and in arrest of judgment, which were overruled, the court

1941-1942

Opinion filed Oct. 13, 1951

Now, that is what occurred in the case at bar.

The case was tried by the Judge without the intervention of a Jury by agreement of the parties. The court, after a full hearing, found the defendant guilty, and assessed J. Edgar Hoover's damages at the sum of \$100.00. After making motions for a new trial and in arrest of judgment, which were overruled, the court

entered judgment on the finding, and the defendant brings the record here for reversal.

The title of plaintiff to the property in question was obtained under certain judgments in the Municipal Court of Chicago, and judgments and executions against Louis Smokiski and Stanley Starciak, partners doing business under the name of Public Parlor Furniture Company. The regularity of the process and of the sale is not in dispute. The defendant claims the property under a mortgage given by Louis Smokoski claiming to be doing business as the Public Parlor Furniture Company. There is no dispute but what Smokoski and Starciak were partners doing business under the name of Public Parlor Furniture Company. The defendant in its brief says: "We will concede without, however, admitting such to be the fact, that the plaintiff's liens, under its executions, were prior liens to that acquired by the defendant under its chattel mortgage."

The contention of defendant is that the bailiff of the Municipal Court stated at the sale that the property was sold subject to the chattel mortgage of Stanley Starciak, and that the doctrine of estoppel in pais precludes plaintiff from claiming to the contrary. However, the trial judge in effect ruled out the Stanley Starciak chattel mortgage, and held that it was not a lien. The property was partnership property of Starciak and Smokoski, who were partners and comprised the firm of Public Parlor Furniture Company, and as Starciak did not join in the chattel mortgage, the mortgage by Smokoski did not have

entered judgment on the finding, and the defendant
brings the record here for reversal.

The title of plaintiff to the property in
question was obtained under certain judgments in the
Michigan Court of Appeals, and judgments and execu-
tions against Louis Smolenski and Stanley Smolenski, who
were doing business under the name of White Motor
Turnpike Company. The regularity of the process and
of the sale is not in dispute. The defendant claims the
property was a mortgage given by Louis Smolenski and
not to be held business as the White Motor Turnpike
Company. There is no dispute but that Smolenski and
Stanley were partners doing business under the name
of White Motor Turnpike Company. The defendant is in
this case. The will of Louis Smolenski, deceased, was
found to be the fact, that the plaintiff's claim, under
the execution, were prior liens to that acquired by the
defendant under the stated mortgage.

The contention of defendant is that the plaintiff
of the Michigan Court stated at the time that the property
was sold subject to the stated mortgage of Stanley Smolenski
claim, and that the doctrine of estoppel in rem prodest
plaintiff from claiming to the contrary. However, the
trial judge in effect ruled out the Stanley Smolenski
stated mortgage, and held that it was not a lien. The
property was partnership property of Stanley and Smolenski,
who were partners and occupied the firm of White Motor
Turnpike Company, and as Stanley did not join in the
stated mortgage, the mortgage by Smolenski did not have

the effect of conveying the partnership property therein named, the judgments were against the partnership and its property was levied upon and sold to plaintiff.

Plaintiff denied that the bailiff made the statement claimed by the defendant that the sales under the Municipal Court executions were made subject to the Smokoski chattel mortgage. The return of the bailiff was that he sold "all the right, title and interest" of the defendants under the executions. That return is conclusive on all the parties and those claiming under them. It cannot be attacked collaterally. Toledo Computing Scale Co. v. Johnson, 194 Ill. App. 153.

The court said in Shirk v. Ry. Co., 110 Ill. 661, "That no one but the defendant in the execution can question the sale for irregularity, however gross, especially in a collateral proceeding." It is evident that the chattel mortgage made by Louis Smokoski was not a lien on the property in question as against plaintiff's liens under the Municipal Court executions supra. Defendant was not a party to the suits of plaintiff in the Municipal Court under which sales were made and cannot in this proceeding challenge the return of the bailiff of sales made under the executions. No one could make such an attack but the defendants in the executions. Such an attack cannot be made collaterally. The doctrine of estoppel in pais has no application to the facts in this case. In no case can the return of an officer upon a writ be set aside except by a clear preponderance of the proof. Davis v. Dresback, 61 Ill. 383; Kochman v. O'Neill, 203 Ill. 110. There is no such preponderance in this record

two effect of conveying the partnership property therein
named, the judgments were against the partnership and the
property was levied upon and sold to plaintiff.

Plaintiff denied that the bill of sale was
the property of the partnership and that the sale was
the property of the partnership and that the sale was
the property of the partnership. The return of the bill of
sale was that he sold "all the right, title and interest of
the defendant under the execution. That return is con-
clusive on all the parties and those claiming under them.
It cannot be attacked collaterally. 100 N. E. 2d 111
101 N. E. 2d 111, 102 N. E. 2d 111.

The court said in 101 N. E. 2d 111, 102 N. E. 2d 111,
"That no one but the defendant in the execution and judgment
the sale for irregularity, however gross, especially in a
collateral proceeding." It is evident that the return
made by the defendant was not a lien on the prop-
erty in question as against plaintiff's lien under the
judgment and execution. 100 N. E. 2d 111, 101 N. E. 2d 111,
which to the sale of plaintiff in the municipal court under
which sales were made and account in this proceeding plaintiff
the return of the bill of sale made under the execution.
No one could make such an attack but the defendant in the
execution. Such an attack cannot be made collaterally.
The doctrine of 101 N. E. 2d 111 has no application to the
facts in this case. In no case was the return of an officer
made a lien on the property in a collateral proceeding. 100 N. E. 2d 111,
101 N. E. 2d 111, 102 N. E. 2d 111. There is no such proceeding in this record.

on that question.

The trial being before the court, we would not be warranted in reversing the judgment unless we are able to say, which we are not, that the judgment is clearly and manifestly against the preponderance of the evidence, having in mind that "it must be presumed on appeal from a judgment after a trial by the court without a jury that the court considered only competent evidence." People v. Askins, 290 Ill. App. 621. The admissible evidence in this record sustains the judgment of the trial court. Therefore that judgment is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

we have decided.

The trial being before the court, we would not

be concerned in reversing the judgment unless we are

able to say, which we are not, that the judgment is

clearly and manifestly against the requirements of the

statute, having in mind that it was the present law

applied to the judgment after a trial by the jury with

and a jury that the court manifested only oversight.

Witness: James v. Adams, 100 Ill. 440, 441.

The statute requires in this case that the judge

shall at the trial make a statement of the facts

presented.

REMARKS.

WILLIAM, J. AND WILSON, J. CONCUR.

430 - 31562

246 I.A. 612¹

JOSEPH B. GRONIN,

Appellee,

by,

CHECKER TAXI COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

BOON COUNTY.

Opinion filed Oct. 19,,1927.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action on the case for personal injuries brought by plaintiff, a passenger in a cab of defendant in which plaintiff was riding as a passenger for hire at the time of the happening of the accident in which he was injured. There was a trial before court and jury, with a verdict of guilty in which damages were assessed at the sum of \$10,000 against the defendant taxi company, upon which judgment was rendered after the overruling of its motions for a new trial and in arrest of judgment. From that judgment defendant prosecutes this appeal and asks for a reversal.

Andrew Gapski was also a defendant. It was his automobile with which defendant's cab came into collision. Both defendants filed pleas of the general issue separately. On the trial Gapski was found not guilty, and he is now out of the case.

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1961: 240-241

Opinion filed Oct 19 1937

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This is as well as it could be.

The defendant was riding as a passenger in a cab of
 defendant in which plaintiff was riding as a passenger for
 hire at the time of the happening of the accident in which
 he was injured. There was a trial before court and jury.
 with a verdict of guilty in which damages were assessed
 at the sum of \$10,000 against the defendant taxi company,
 upon which judgment was rendered after the overruling
 of the motion for a new trial and in favor of judgment.
 From that judgment defendant commenced this appeal and
 asks for a reversal.

On the first Cabell was found not guilty, and he is now out of the State. The second Cabell was found guilty, and he is now out of the State. The third Cabell was found guilty, and he is now out of the State. The fourth Cabell was found guilty, and he is now out of the State. The fifth Cabell was found guilty, and he is now out of the State. The sixth Cabell was found guilty, and he is now out of the State. The seventh Cabell was found guilty, and he is now out of the State. The eighth Cabell was found guilty, and he is now out of the State. The ninth Cabell was found guilty, and he is now out of the State. The tenth Cabell was found guilty, and he is now out of the State.

The cause went to trial upon the first and third counts of plaintiff's declaration. These counts charged that the defendant carelessly, negligently and improperly drove and operated the taxicab in which plaintiff was riding eastward along Lawrence Avenue, and that said Gapski then and there so carelessly, negligently and improperly drove and operated his automobile southward along and upon Robey street, that the taxicab and the automobile then and there came into violent collision and the plaintiff was, by reason of such negligence, and the said collision, thrown about and against divers parts of the interior of the taxicab with great force and violence and thereby sustained divers and permanent injuries, both externally and internally; that he was greatly hurt, bruised and wounded, and that divers bones in his body and limbs were broken, crushed and maimed, and he sustained divers severe and permanent injuries to his limbs, chest, abdomen, spine and internal organs, and also a severe shock and injury to his nervous system, and became sick, sore, lame and disordered, and suffered great pain and anguish by reason of said injuries, and will be permanently hindered and prevented from attending to his affairs and duties, and was compelled to and did expend and become liable for divers large sums of money in and about endeavoring to be cured off his injuries, etc.; and also charged that defendant drove the taxicab in which plaintiff was a passenger at a high, dangerous and excessive rate of speed, to-wit, at the rate of 40 miles an hour, in violation of the provisions of the Statutes of Illinois.

The cause went to trial upon the first and
third counts of Plaintiff's declaration. Those counts
charged that the defendant carelessly, negligently and
imprudently drove and operated the vehicle in such a manner
that it was being carried along between the
said被告 then and there as carelessly, negligently
and imprudently drove and operated his automobile south-
ward along and upon Highway Street, that the vehicle and
the automobile then and there came into violent collision
and the Plaintiff was, by reason of such negligence, and
the said defendant, forever injured and against whose person
of the interior of the vehicle with great force and violence
and thereby sustained grievous and permanent injuries, both
externally and internally; that he was greatly hurt, bruised
and wounded, and that there bones in his body and limbs
were broken, crushed and maimed, and he sustained grievous
severe and permanent injuries to his limbs, chest, abdomen,
spine and internal organs, and also a severe shock and injury
to his nervous system, and became sick, sore, lame and dis-
oriented, and suffered great pain and anguish by reason of
said injuries, and will be permanently hindered and im-
paired from attending to his athletic and duties, and was
compelled to and did expend and become liable for others
large sums of money in and about endeavoring to be cured
of his injuries, etc.; and also charged that defendant
drove the vehicle in which Plaintiff was a passenger at
a high, dangerous and excessive rate of speed, to-wit:
at the rate of 40 miles an hour, in violation of the pro-
visions of the Statute of Illinois.

The defendant argues for reversal that there is a variance between the averments of the declaration and the proofs and the giving of three erroneous instructions at the instance of the plaintiff.

It is in evidence that on the 28th day of March, 1924, plaintiff between two and two thirty in the morning engaged defendant's cab at the Rainbo Gardens, Clark street and Lawrence avenue, Chicago, and with a young lady entered the cab and were driven to her home, which was on St. Louis avenue; that the young lady left the cab at her home to which plaintiff escorted her, and returning entered the cab again, and directed the driver to take him to his residence at the Chelsea Hotel, Wilson avenue, east of Sheridan Road; that the cab proceeded east on Lawrence avenue in the east bound street car track at a speed of about 20 or 25 miles an hour; that plaintiff's attention was attracted to the speed of the car and that he noticed a veering of the car out of the car tracks and to the right; that after the impact plaintiff remembered nothing until he found himself in the hospital.

Gapeki and one Brzezinski who was riding with Gapeki in his automobile at the time of the collision, testified that the automobile was proceeding south on Robey street, driving on the right hand side of the street in the southbound car track at about 30 miles an hour; that at Lawrence avenue he then slackened up and reduced the speed to about 10 miles an hour, and drove over the crossing; that the front end of Gapeki's car collided with the taxicab on the left side thereof about the rear; that it hit

The defendant argues for reversal that there is a variance between the statement of the defendant and the proofs and the giving of three erroneous instructions at the instance of the plaintiff.

It is in evidence that on the 23rd day of March, 1904, plaintiff between two and two thirty in the morning stopped defendant's car at the Illinois Hotel. Their driver and Lawrence Avenue, Chicago, and with a young lady entered the car and were driven to her home, where she was to be visited; that the young lady left the car at her home to which plaintiff escorted her, and returning entered the car and drove the driver to take him to his residence at the Chicago Hotel, Wilson Avenue, east of Sheridan Road; that the car proceeded east on Lawrence Avenue in the east bound street car track at a speed of about 20 or 25 miles an hour; that plaintiff's attention was attracted to the speed of the car and that he noticed a veering of the car out of the car tracks and to the right; that after the instant plaintiff perceived nothing more he found himself in the hospital.

Gepski and one Hrozinski who was riding with Gepski in his automobile at the time of the collision testified that the automobile was proceeding south on Robey Street, driving on the right hand side of the street in the southbound car track at about 20 miles an hour; that at Lawrence Avenue he then slackened up and reduced the speed to about 10 miles an hour, and drove over the crosswalk on the left side thereof about the year; that it hit

the taxicab hard; that there was a crash and a loud noise; that the force of the impact sent the Checker Cab "somewhat in the air"; that it swung around and hit a post on the southeast corner of Lawrence avenue and Robey street; that the Checker Cab increased its speed as it approached Robey street and circled to the right in an apparent endeavor to get ahead of Gapski's car; that after striking Gapski's automobile the Checker cab collided with the post at the southeast corner of Lawrence avenue and Robey street.

Defendant's driver contended that he approached the crossing in question at a speed of about 15 miles an hour; that when he reached the west building line he slowed down to a speed of about 8 miles an hour; that when he proceeded over the crossing he was run into by Gapski's car. He likewise contends that he brought his car to a full stop before crossing Robey street at a speed of three or four miles an hour when something struck him in the rear and knocked his cab against a post; that he did not see the car that collided with him at any time before the collision occurred.

Drossell, a witness called by defendant, testified that the cars approached the intersection at approximately the same time, except that the Checker cab was perhaps ten feet nearer the west cross walk of Robey street than Gapski's car was to the north cross walk of Lawrence avenue; that they were both in plain view of each other; that there was nothing to prevent them from seeing each other and that when he saw the cars he expected a collision.

Henry M. Cairo, another witness for defendant, testified that he saw the automobile being driven south on Robey street, and that it was about 135 feet north of the north curb of Lawrence avenue in the south bound car track, that at the time the Checker cab was about 35 feet west of the west curb of Robey street; that he could see it coming plainly, as it was open there and there was nothing to prevent his seeing it; that when the Checker cab got within five or ten feet of the crossing it slowed down to 10 or 12 miles an hour; that Gapski's car, southbound on Robey street, was going about 25 or 30 miles an hour, and that the Checker cab was going about 15 miles an hour before it slowed down for the crossing; that the Checker cab began to slow up about 50 feet from the crossing and kept slowing down continuously; that the Checker cab was driving in the east bound track or close to it and going straight east.

It is therefore patent from the foregoing contrariety of evidence in regard to the happening of the accident that the facts were for the jury to solve.

While we are of the opinion that there is no variance, as claimed by defendant, or that the proof in the case does not sustain the material averments of the declaration in regard to the happening of the accident, still however this may be, it is sufficient to say, that the question of variance was not raised in the trial court, and therefore cannot be raised here. Huffman v. Yellow Cab Co., 238 Ill. App. 289.

David A. Miller, *University of Illinois at Urbana-Champaign*

Verified that he was the individual being driven against an alley

There are no other persons who have been in contact with the subject since the time of his arrest.

At the time the checker card was about 35 feet west of the

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It is also noted that the following information was received from the Bureau of the Census:

...and the fact that the ...

100-44388-1A

one was being taken in 1955 and the other in 1956.

the number of the last page of the text.

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that the children are not drinking at all in the early years of life

...and the other side of the road...

1870

1900

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

Will be one of the options when the

...as claimed by defendant, or that the goods in the

These were the only two persons who were not present at the time of the shooting.

1944-1945

054 1-74 Page 46 20080109 00 00 00 00 00 00 00 00

...and ...

And now I wish to read to you a poem by a young man, a student of the University of Chicago, who has just won the Pulitzer Prize for poetry.

附註：1. 本表係根據 1997 年 12 月 31 日之資料編製。

While a motion was made at the close of plaintiff's proofs to direct a verdict for defendant, nevertheless defendant proceeded with its defense and proved by its driver of the offending cab that he was going east on Lawrence avenue and came down to Robey street; that he was half way over when a car that was coming south on Robey street, which he had never seen, and did not know where it came from, "hit me on the left, knocked a wheel off, and knocked me against a telephone post"; that this car was struck with the front end of Capeki's car and that the car hit him hard.

Defendant's witness Drossel testified that there was a crash, the Checker cab swung around so that it faced the north, swung into the pole, broke the wheel on it, and smashed it up considerably; and the witness Cairo testified that "when these cars came together, I heard a crash, a loud noise, naturally, like two machines coming together. It was an awful loud report."

As said in J.A. & N. Ry. Co. v. Velie, 140 Ill. 59, that "even though a motion to exclude plaintiff's evidence made at the close of his case may have been improperly overruled, yet the evidence on both sides when considered all together may show so clearly, that the cause depends upon the effect or weight of testimony, as not only to justify but to require the jury to pass upon it. Would it be right for this court to reverse a judgment for error in overruling such a motion, if it could plainly see that the case was one for the jury in view of all the testimony presented by both sides, and that it was properly submitted to the jury under

While a motion was made at the close of plaintiff's

testimony to dismiss the complaint, the defendant's motion

was not proceeded with and the motion was granted by the driver of

the offending car that he was going east on Madison street

and came down to Broadway street; that he was half way over

when a car came from the west on Madison street, which is

had never seen, and did not know where it came from, this

car on the left, knocked a wheel off, and knocked me against

a telephone pole; that this car was driven by Mr. Wm. T. Tread

and Mr. Campbell's car and that the car hit his hand.

Defendant's witness likewise testified that there

was a crash, the trucker was thrown against the car and

the car, being into the pole, broke the wheel on it, and

knocked it up considerably; and the witness likewise testified

that when these cars were together, I heard a crash, a loud

noise, and that, naturally, this testimony would be given.

was an early loud report."

As said in L.A. v. W. T. Tread, 143 Cal. 111, 33

that even though a motion to exclude plaintiff's testimony

made at the close of his case may have been improperly over-

ruled, yet the evidence on both sides then considered all

together was such as clearly, that the court should have

the effect of weight of testimony, as not only to fairly

but to require the jury to pass upon it. Would it be right

for this court to reverse a judgment for error in overruling

such a motion, if it could plainly see that the case was not

for the jury in view of all the testimony presented by both

sides, and that it was properly submitted to the jury under

instructions applicable to a controverted state of facts? We think not. If the defendant in this case felt confidence in the position, that the evidence introduced by the plaintiff established no cause of action, it should have stood by its motion."

Taking the whole of the evidence in the record, particularly that of defendant, we think the jury were justified in returning a verdict for the plaintiff. Defendant, by introducing evidence in contradiction of plaintiff's case, waived any error there may have been in the action of the court in overruling the motion to instruct a verdict at the close of plaintiff's proofs. Gilbert v. Watts-DeWolfer Co., 169 Ill. 129. To a like effect is Smith v. Kewanee Light and Power Co., 196 Ill. App. 112, and Dixon v. Smith Wallace Shoe Co., 283 Ill. 834.

The testimony that defendant's driver did not see the Gapski automobile or any other automobile in the street was tantamount to an admission of negligence. From the fact that the driver testified that he did not see Gapski's automobile when it was in plain, unobstructed sight, the law will assume that he did not look. The collision averred in the first and third counts of the declaration is abundantly proven by the evidence. Whether that collision was slight or violent is immaterial, therefore the instructions complained of were properly given and were supported by the proofs.

Defendant makes no contention regarding the extent or seriousness of the injuries suffered by plaintiff, as

introduction of evidence as a matter of course. We think not. If the defendant in this case left any evidence in the position, that the evidence introduced by the plaintiff established no cause of action, it should have stood by its motion.

Turning the whole of the evidence in the record,

particularly that of defendant, we think the jury were

justified in finding a verdict for the plaintiff. There-

fore, by introducing evidence in contradiction of plaintiff's

case, raised any error there may have been in the action of

the court in overruling the motion to sustain a verdict

at the close of plaintiff's case. Gilbert v. Western

20... 100 N.W. 100. 100 N.W. 100. 100 N.W. 100. 100 N.W. 100.

100 N.W. 100. 100 N.W. 100. 100 N.W. 100. 100 N.W. 100.

The testimony that defendant's driver did not

use the spark automobile or any other automobile in the

action was sufficient to an admission of negligence. From

the fact that the driver testified that he did not use

any automobile when it was in plain, unobstructed

sight, the law will assume that he did not. The

collision occurred in the first and third corners of the

intersection is abundantly proven by the evidence. Whether

that collision was slight or violent is immaterial. There-

fore the instructions complained of were properly given

and were supported by the facts.

Reversed and remanded with instructions regarding the verdict

on account of the negligence of plaintiff, as

the result of the accident caused by the negligence charged in the first and third counts of the declaration, or that the damages awarded by the jury are excessive.

For the foregoing reasons the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

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DATE 08-10-2001 BY 60322 UCBAW

For the following reasons the subject is not

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— 1988 —

RECEIVED JAN 10 1964

PEOPLE OF THE STATE OF ILLINOIS,
 ex rel. ANDREW P. MILLER, for
 and on behalf of ANDREW ROBERT
 MILLER,

Plaintiff in Error,

v.

JOHN PECOR and DELIA PECOR,

Defendants in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 19, 1927.

MR. JUSTICE HOLBOM delivered the opinion of the court.

This is a writ of Habeas Corpus sued out by the petitioner, Andrew P. Miller, for the custody of his minor child, Andrew Robert Miller, six years of age, then in the custody of respondents, his maternal grand parents. The mother of the child is dead, and at the time of her death she was evidently estranged from her husband, the petitioner, and had pending in the Superior Court of Cook County a suit for separate maintenance, in which suit the custody of the child was pendente lite awarded to the mother, who had possession of said child, and that since the mother's death the respondents have had the custody of said child. That the mother at the time of her death left her surviving her husband, the petitioner, and the child the relator herein.

The writ was served upon the respondent John Pecor, and returned not found as to the respondent Delia Pecor. On May 10, 1926, the final order appealed from, in words as follows, was entered:

3461.A.613

PEOPLE OF THE STATE OF ILLINOIS,
 vs. JAMES P. MILLER, for
 and in behalf of ROBERT MILLER,
 Petitioner.

VERIFICATION OF PETITION.

7.

JOHN TROOP and EMILIA TROOP,

(Deponents in Error.)

Opinion filed Oct. 19, 1927.

MR. JUSTICE HOLLOM delivered the opinion of the

court.

This is a writ of habeas corpus issued out by the
 petitioner, Andrew P. Miller, for the custody of his minor
 child, Andrew Robert Miller, six years of age, then in the
 custody of respondents, his maternal grandparents. The
 mother of the child is dead, and at the time of her death
 she was evidently estranged from her husband, the petitioner,
 and had pending in the Superior Court of Cook County a suit
 for separate maintenance, in which suit the custody of the
 child was pendente lite awarded to the mother, who had pos-
 session of said child, and that since the mother's death the
 respondents have had the custody of said child. That the
 mother at the time of her death left her surviving her husband,
 the petitioner, and the child the respondent herein.

The writ was served upon the respondent John Troop,
 and returned not found as in the respondent's plea herein. On
 May 16, 1926, the final order appealed from, in words as follows,
 was entered:

"This day come the respondents and the relator by his attorney and in his own proper person also comes and the court now here after hearing all of the evidence adduced the arguments of counsel and being fully advised in the premises finds that said relator is lawfully held in the custody of said respondents it is therefore ordered that said relator Andrew Robert Miller be and he is hereby remanded to the custody of respondents."

Petitioner made motions for a new trial and in arrest of judgment which being overruled, he sued out this writ of error. The respondents have failed to appear in this court.

The common law record only is before us. There is no bill of exceptions in this record.

There appears from the record to have been a contempt proceeding against the respondent, John Pecor, but the record shows that the attachment for contempt was by order of the court quashed.

It is argued for reversal that the order awarding the custody of the child of petitioner to his grand parents is void because Delia Pecor was not served with the writ of Habeas Corpus, and because neither of the respondents made a return to the writ in writing, as provided by statute.

The record affirmatively shows that the respondents appeared upon the trial, and that the court heard all the evidence adduced by the parties, together with the arguments of the respective counsel, and upon due consideration thereof

"This day came the respondents and the relator
by his attorney and in his own person, and the court
and the court now here after hearing all of the evidence
advised the arguments of counsel and being fully advised
in the premises finds that said relator is lawfully entitled
in the custody of said respondents it is therefore ordered
that said relator Andrew Robert Miller be and he is hereby
committed to the custody of respondents."

Relator made motions for a new trial and in
error of judgment which being overruled, he went out with
with of error. The respondents have failed to appear in
this court.

The common law record only is before me. There
is no bill of exceptions in this record.

There appears from the record to have been a com-
plete proceeding against the respondent, John Brown, but the
record shows that the statement for contempt was by order
of the court quashed.

It is argued for reversal that the order awarding
the custody of the child to petitioner to the grand juror is
void because said factor was not served with the writ of
Habeas Corpus, and because neither of the respondents made a
return to the writ in writing, as provided by statute.

The record affirmatively shows that the respondents
appeared upon the writ, and that the court heard all the
evidence adduced by the parties, together with the arguments
of the respective counsel, and upon due consideration thereof

pronounced judgment. In the absence of a bill of exceptions we have no facts before us which are reviewable in this court. We therefore assume that the proofs are sufficient to support the judgment. While there is an informality in procedure in that there was no formal written return to the writ by the respondents, yet they made a return by their personal appearance in court and in taking part in the trial and in submitting themselves to the jurisdiction of the court. The petitioner might have compelled respondents to make a written return to the writ upon motion, but he proceeded to trial without objection and thereby, we think, waived the informality. It is too late to raise a question in this court that was not raised in the trial court. Counsel have referred us to no case in Illinois which decides that a failure to make a formal written return to the Habeas Corpus writ voids a judgment entered upon a hearing where all the parties are before the court in propria persona, and the court has jurisdiction of the parties and the subject-matter of the cause, and all parties, as in the case at bar, proceed to trial and judgment without objection or raising in any way the question of the failure of respondents to make a written return to the writ.

The facts stated in the petition, uncontradicted, may be sufficient to entitle petitioner to the relief prayed, but if on the hearing there was an utter failure to sustain by proper proof the facts alleged in the petition, the facts stated in the petition itself would be unavailing to warrant a judgment dehors the proofs, - providing however, the facts stated were material and necessary to a recovery. In the absence of a bill of exceptions we are unable to say what the proofs

presented judgment. In the absence of a bill of exceptions
we have no doubt as to the correctness of the
the before us and the facts are sufficient to support
the judgment. While there is an informality in procedure
in that there was no formal written return to the writ by
the respondents, yet they made a return by their personal
appearance in court and in taking part in the trial and
in submitting themselves to the jurisdiction of the court.
The petitioner might have compelled respondents to make a
written return to the writ upon motion, but we proceeded to
trial without objection and thereby, we think, waived the
informality. It is too late to raise a question in this court
that was not raised in the trial court. Counsel have referred
us to no case in Illinois which decides that a failure to
make a formal written return to the habeas corpus writ voids
a judgment entered upon a hearing where all the parties are
before the court in proper person, and the court has juris-
diction of the parties and the subject-matter of the writ,
and all parties, as in the case at bar, proceed to trial and
judgment without objection or raising in any way the question
of the failure of respondents to make a written return to
the writ.

The facts stated in the petition, uncontradicted, may
be sufficient to entitle petitioner to the writ prayed, but
if on the hearing there was an error failure to comply with
proper procedure the facts alleged in the petition, the facts stated
in the petition itself would be unavailing to warrant a judg-
ment behind the scenes, - providing however, the facts stated
were material and necessary to a recovery. In the absence of
a bill of exceptions we are unable to say what the facts

were and whether they sustained the averments of the petition or failed so to do.

There is no reversible error in the common law record before us, and it follows that the judgment of the Superior Court must be and is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

with and without the assistance of the British
as failed us in all.

There is no possibility of a return to the common law
except before us, and it follows that the judgment of the
Executive must be and is affirmed.

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ALBERT ROGGENBUCK and AUGUSTA
ROGGENBUCK,

Appellees,

v.

A. JULIUS BREHAUS,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. JUSTICE HOLDEN delivered the opinion of
the court.

This case is here for the second time. The facts
and the law of the case will be found in a decision rendered
by this court March 10th, 1926, (241 Ill. App. 605) in case,
General Number 30409, for which law and facts reference there-
to is hereby made, and adopted as a part of this opinion.

In the foregoing opinion the cause was reversed
and remanded to the Municipal Court "for further proceedings
not inconsistent with the views herein set forth."

On the second trial all that remained for the
trial court to do was to follow the opinion of this court,
supra, and assess the damages in accordance with its directions.

In the former trial defendant waived his right to a
trial by jury and the court heard the evidence of the plain-
tiffs, from which it assessed their damages under the breach
of contract set forth in the opinion supra at the sum of
\$3735.18, after overruling motions for a new trial and in
arrest of judgment.

2401.A.012

2401.A.012

MUNICIPAL COURT
CHICAGO, ILL.

ALBERT ROBERTS and ALBERT
ROBERTS
Appellants
vs.
J. J. ROBERTS
Appellant

Opinion filed Oct. 18, 1937.

THE COURT
The court.

This case is here for the second time. The facts and the law of the case will be found in a decision rendered by this court March 19th, 1936, (241 Ill. App. 608) in case, General Number 30408, for which law and facts reference there- to is hereby made, and adopted as a part of this opinion.

In the foregoing opinion the cause was reversed and remanded to the Municipal Court for further proceedings not inconsistent with the views herein set forth.

On the second trial all that remained for the trial court to do was to follow the opinion of this court, affirm, and assess the damages in accordance with its directions.

In the second trial judgment was given in favor of the plaintiff by jury and the court heard the evidence of the plaintiff, from which it assessed their damages under the bench of contract set forth in the opinion supra at the sum of \$3735.18, after overruling motions for a new trial and in arrest of judgment.

On plaintiffs' resting their case defendant moved for a finding in his favor, which was overruled, and at the same time defendant asked the court that he be given the right to present his entire defense on the facts of the case,- "in other words, that we be given the right to introduce each and every defense that the defendant in this case has, as set forth by the affidavit of merits heretofore filed by the defendant in this case." This motion the court denied, and the defendant failing to introduce any evidence the court proceeded to pronounce judgment.

Defendant now argues for reversal, first, that he was entitled to a trial de novo; second, that he was entitled to a trial by jury; third, that the judgment is not supported by the evidence and the record, and fourth, that the defendant has the right to introduce evidence in support of the defenses set forth in the defendant's affidavit of merits. Defendant contends in argument that the former appeal was reversed and the cause remanded generally. This is not an exact statement of the record in this court. It was remanded with directions to proceed in accord with the opinion rendered, and directed the method to be pursued in assessing defendant's damages.

In the Municipal Court a cause stands for trial before the court without a jury unless one of the parties asks for a trial by jury. The defendant waived his right to a trial by jury. That waiver holds good whenever the case comes up for trial whether on an initial or a secondary hearing. In Simon v. Reilly, 321 Ill. 431, it was held that

On Plaintiff's Motion, the Court will grant a new trial.

For a finding in his favor, which was overruled, and at the same time defendant asked the court that he be given the right

to present his entire defense on the facts of the case.

"In other words, that he be given the right to introduce each and every defense that the defendant in this case has, as set

forth by the affidavits of merit heretofore filed by the defendant in this case." This motion the court denied, and

the defendant failing to introduce any evidence the court proceeded to pronounce judgment.

Defendant now argues for reversal, first, that

he was entitled to a trial by jury; second, that he was

entitled to a trial by jury; third, that the judgment is not

supported by the evidence and the record, and fourth, that

the defendant has the right to introduce evidence in support

of the defense set forth in the defendant's affidavits of

merit. Defendant contends in argument that the former

appeal was reversed and the cause remanded generally. This

is not an exact statement of the record in this court. It

was remanded with directions to proceed in accord with the

opinion rendered, and directed the method to be pursued in

the trial.

In the original Court a cause stands for trial

before the court without a jury unless one of the parties

asks for a trial by jury. The defendant waived his right

to a trial by jury. That waiver holds good whenever the

case comes up for trial whether on an initial or a secondary

hearing. In Woods v. Miller, 231 Ill. 431, it was held that

a party had a right to a trial by jury unless he waived it. In the Reilly case the waiver of a jury trial was made in the first trial and it was not held to be error to have adhered to the waiver on the second trial. In that regard the instant case and the Reilly case, supra, are the same.

The record shows that the judge in assessing plaintiffs' damages computed same according to the directions of this court in its opinion on the first appeal supra. Therefore, as the learned judge of the Municipal Court assessed the damages in accordance with the direction in this court's opinion in that regard, it is without error.

This court has no jurisdiction to determine constitutional questions, and as the Supreme Court has held, by coming to this court constitutional questions are waived. As the Supreme Court held in Simon v. Reilly, supra, if a party desires to have a review of a judgment of the trial court on constitutional grounds, he should prosecute an appeal or writ of error to the Supreme Court, or where his opponent has taken the case to the Appellate Court he should assign errors on constitutional grounds so that the appeal may be transferred to the Supreme Court. It therefore follows that this court is without jurisdiction to determine the constitutional questions raised by defendant on this appeal.

As to Point III, we have already pointed out that the trial judge followed the directions of the former opinion of this court, and we hold that the evidence so heard is ample to support the judgment which the court rendered and from which this appeal is prosecuted.

a party had a right to a trial by jury unless he waived it.
in the Kelly case the waiver of a jury trial was made in
the first trial and it was not held to be void on that
subject in the waiver on the second trial. In that regard
the instant case and the Kelly case, Kelly, are the same.

The record shows that the judge in directing the
jury, damages computed were according to the directions of this
court in its opinion on the first appeal matter. Therefore,
on the learned judge of the Municipal Court assessed the
damages in accordance with the direction in this court's
opinion in that regard, it is without error.

This court has no jurisdiction to determine con-
stitutional questions, and as the Supreme Court has held,
by coming to this court constitutional questions are waived.
As the Supreme Court held in Ellen v. Kelly, supra, it is
party desired to have a review of a judgment of the trial
court on constitutional grounds, he should prosecute an appeal
or writ of error to the Supreme Court, or where his opponent
has taken the case to the Appellate Court he should assign
errors on constitutional grounds so that the appeal may be
transferred to the Supreme Court. It therefore follows that
this court is without jurisdiction to determine the constitutional
questions raised by defendant on this appeal.

As to Point III, we have already pointed out that
the trial judge followed the directions of the former opinion
of this court, and we hold that the evidence so heard is
ample to support the judgment which the court rendered and
that this appeal is unnecessary.

As to Point IV, defendant's claim of right to introduce evidence in support of all the defenses set forth in his affidavit of merits, it is sufficient to say that those questions were determined in our former decision of this case.

The record before us is without reversible error, and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

in the case of the witness's claim to right to be
excluded witness is subject to all the rules and that in
his affidavit or motion, it is sufficient to say that those
questions were determined in our former decision in this case.

The court below in its recent decision stated
that the judgment of the district court is reversed and affirmed.

REMARKS

TAYLOR, J. AND WILSON, J. CONCUR.

197 - 31329

ANDERSON AND LIND MANUFACTURING
COMPANY, a Corporation,

Appellee,

v.

W. W. HILL, et al on appeal of
BERT M. KOHLER and HELEN E. KOHLER,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

The facts in this case disclose that one Bert M. Kohler and Helen E. Kohler, his wife, were the owners of Lot 1, in Johnson's Subdivision, etc., hereinafter referred to as No. 228 Lincoln Drive, located in the Village of Glenwood, in Cook County. It appears that these defendants, on or about April 24, 1922, entered into a contract in writing with W. W. Hill and J. J. Reilly, co-partners doing business under the name of Hill Construction Company, for the erection of a two story and basement residence and garage on the premises in question. Pursuant to said contract, the said defendant Hill Construction Company undertook to build said residence, and in the course of the construction obtained from the complainants, appellee in this case, certain building material which entered into the construction of said building, and the cost of which material amounted to the sum of \$1500.52. In addition to this it appears that there was an additional amount of \$47.00 in material furnished by the appellees in the way of extras.

RECEIVED - Mr. J. H. HARRIS CHIEF OF BUREAU	RECEIVED - Mr. J. H. HARRIS CHIEF OF BUREAU
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Opinion filed Oct. 19, 1937.

Mr. J. H. HARRIS delivered the opinion of

the court.

The issue is this: whether the fact that

the defendant was a minor, at the time of the

act, is a material consideration in determining

whether the defendant is liable for the crime charged.

In this case, it is contended that the defendant

was a minor at the time of the act, and that

the fact that he was a minor is a material

consideration in determining whether he is

liable for the crime charged.

It is contended that the fact that the

defendant was a minor at the time of the

act is a material consideration in determining

whether the defendant is liable for the crime

charged.

It is contended that the fact that the

defendant was a minor at the time of the

act is a material consideration in determining

The work in question was under the direction of one Solon L. Reilly, a person of the same name as the member of the firm of Hill & Company, hereinbefore referred to, but differently spelled. It appears from the evidence that at the same time there were being built upon the same street two other residences, and which were being erected at 256 and 260 Lincoln Drive, Glencoe, by two persons of the name of Hurge and Hase, and the construction of said building was also under the direction of the architect Reilly. It appears, moreover, that material was also furnished for these buildings by Anderson and Lind. The building of the defendants Kohler was started in 1922 and finished on or after December 7, 1922. There seems to be some dispute as to whether or not the last material furnished by Anderson and Lind was furnished prior to December, 1922, but the evidence of the witness Bettendorf, for the complainant, who was a carpenter on the job at the time in question, together with the receipt for the material, signed by him on that date, is convincing that the last delivery was on December 7, of that year. Such being the fact, the filing of the lien notice and the starting of the suit in said cause, would both come within the period prescribed by the statute. The question narrows itself down to the proposition as to whether or not a certain check, given by the architect Reilly, in October of that year and made out to Hill & Company but presented to the agent of the appellant and by him in turn presented to Hill & Company, was a payment, and whether the waiver given in exchange for said check was, in fact, a waiver, it appearing that said check was turned over to Hill & Company by the agent of the appellant

and in exchange therefor the appellant received a check of Hill & Company, the contractor; said check of Hill & Company being refused payment when subsequently presented by the appellant at the bank for payment. The check in question was signed "H. C. Speer & Sons" and it appears that similar checks had been given by Kohler instead of his personal check, and had been accepted and honored when presented, and, as a matter of fact, this check when presented by the contractors Hill & Company, was paid to them by the bank. There appears to be a disputed question as to whether or not the architect, at the time he gave this check to the agent of the appellant, told him he should have it endorsed by Hill & Company and not turned over to them, and the architect so testified when on the stand, but the testimony was disputed by Frey, the employee of the appellant Company, who testified directly contrary thereto, viz., that he was instructed to take said check to Hill & Company and that they would arrange for the payment. This check was for \$1900.00, and covered the cost of material furnished by Anderson and Lind on the Kohler residence as well as on the Barge and Rose residences, but the amount involved in this particular case is the amount of \$900 which was then due under the Kohler contract, for material furnished by Anderson and Lind for the Kohler job. Frey testified that upon taking the check to the defendant, Hill & Company, they issued him the check which was afterwards dishonored, in place of the check which he delivered to them from the architect Reilly. The question particularly involved in this case, the court being satisfied that the action was started within the period of the statute, is as

to whether or not Anderson and Lind, although giving a waiver of lien at the time of the receipt of this check, was bound by this waiver of lien, the check having been dishonored, and this court is of the opinion that, there being no intervening interest involved, it was not a satisfaction and that, therefore, there was no consideration for the waiver of lien, and that said waiver of lien is invalid and of no effect, and that the complainant should recover in accordance with the allegations of his bill. Smith v. Mills, 230 Pac. 350; Lloyd Mortgage Co. v. Davis, 36 A.L.R. 455. The fact that the appellant, through his agent the architect, gave a check payable to Hill & Company, would indicate that he expected it to go through the hands of that payee. If he had not so intended, he could and should have had the check made directly to Anderson and Lind. The chancellor, in addition to finding that there was due the complainants the amount represented by the value of the goods furnished and the extras, also taxed interest as of the date of January 2, 1933, together with the Master's costs and expenses, and the decree of the chancellor is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

250 - 31382

SHRAIBERG MFG. CO., for the use of
ROBERT BACHRACH,

Appellee,

v.

DELAWARE INSURANCE COMPANY OF
NEW YORK,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 19, 1927.

MR. JUSTICE WILSON delivered the opinion
of the court.

This cause was taken and consolidated with cases, Nos. 31381, 31383, 31384, 31385, 31386, 31387, 31388, 31389, 31390, and 31391, and is accordingly governed and controlled by the decision announced in case No. 31381, Shraiberg Mfg. Co. for the use of Robert Bachrach v. Boston Insurance Company of Boston, Massachusetts; and for the reasons stated in said opinion, the judgment of the Municipal Court is reversed and the cause remanded with directions to dismiss said garnishment proceedings on the answer herein filed by the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

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WASHINGTON, D. C.

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WISSE, 21320, 21320, and 21321, and is accordingly

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Robert M. O'Brien v. Boston Insurance Company of Boston

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10075 James Street, New York

...continued by the defendant.

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251 - 31383

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SHRAIBERG MFG. CO., for use of
ROBERT BACHRACH,

Appellee,

v.

THE GIRARD FIRE & MARINE INS. CO.,
OF PHILADELPHIA,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 19, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

This cause was taken and consolidated with
cases Nos. 31381, 31382, 31384, 31385, 31386, 31387,
31388, 31389, 31390 and 31391, and is accordingly
governed and controlled by the decision announced in
case No. 31381, Shraiberg Mfg. Co. for the use of
Robert Bachrach v. Boston Insurance Company of
Boston, Massachusetts; and for the reasons stated in
said opinion, the judgment of the Municipal Court is
reversed and the cause remanded with directions to dismiss
said garnishment proceedings on the answer herein filed by
the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOMDOM, J. CONCUR.

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THE HANCOCK & HARRIS CO.,
OF BOSTON, MASS.

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Opinion filed October 17, 1907.

MR. JUSTICE WILSON delivered the opinion of

the court.

THIS CASE WAS FIRST AND SUBSEQUENTLY

PRESENTED TO THE COURT, FIRST, SECOND, THIRD, FOURTH,

FIFTH, SIXTH, SEVENTH, EIGHTH, AND IS NOW PRESENTED

GOVERNED AND CONTROLLED BY THE DECISION ANNOUNCED IN

CASE NO. 11321, BRITISH WY. CO. FOR THE USE OF

ROBERT BROWN & CO. BOSTON LICENSE COMPANY OF

BOSTON, MASSACHUSETTS; AND FOR THE REASONS STATED IN

SAID OPINION, THE JUDGMENT OF THE SUPREME COURT IS

REVERSED AND THE CASE REMANDED WITH DIRECTIONS TO DISMISS

SAID PETITION WITHOUT COSTS ON THE ANSWER HERETO FILED BY

THE DEFENDANT.

REVERSED AND REMANDED WITH DIRECTIONS.

252 - 31384

SHRAIBERG MFG. CO., for use of
ROBERT BACHRACH,

Appellee,

v.

LIVERPOOL, LONDON & GLOBE INS. CO.,
LTD. of LONDON,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 19, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

This cause was taken and consolidated with cases Nos. 31381, 31382, 31383, 31385, 31386, 31387, 31388, 31389, 31390 and 31391, and is accordingly governed and controlled by the decision announced in case No. 31381, Shraiberg Mfg. Co., for the use of Robert Bachrach v. Boston Insurance Company of Boston, Massachusetts; and for the reasons stated in said opinion, the judgment of the Municipal Court is reversed and the cause remanded with directions to dismiss said garnishment proceedings on the answer herein filed by the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

253 - 31385

SHRAIBERG MFG. CO., for use of
ROBERT BACHRACH,

Appellee,

v.

THE LONDON, LANCASHIRE INS. CO.,
LTD., OF LONDON, ENGLAND,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion
of the court.

This cause was taken and consolidated with cases, Nos. 31381, 31382, 31383, 31384, 31386, 31387, 31388, 31389, 31390 and 31391 and is accordingly governed and controlled by the decision announced in case No. 31381, Shraiberg Mfg. Co., for the use of Robert Bachrach v. Boston Insurance Company of Boston, Massachusetts; and for the reasons stated in said opinion, the judgment of the Municipal Court is reversed and the cause remanded with directions to dismiss said garnishment proceedings on the answer herein filed by the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

MUNICIPAL COURT
OF CHICAGO

IN SENATE
JANUARY 19, 1937
THE CHIEF JUSTICE
OF THE SUPREME COURT
OF THE UNITED STATES
IN SENATE
JANUARY 19, 1937
THE CHIEF JUSTICE
OF THE SUPREME COURT
OF THE UNITED STATES

Opinion filed Oct. 19, 1937.

THE CHIEF JUSTICE DELIVERED THE OPINION

OF THE COURT.

This case was taken and consolidated with
cases, Nos. 11001, 11002, 11003, 11004, 11005, 11006, 11007, 11008, 11009, 11010, 11011, 11012, 11013, 11014, 11015, 11016, 11017, 11018, 11019, 11020, 11021, 11022, 11023, 11024, 11025, 11026, 11027, 11028, 11029, 11030, 11031, and 11032, and is accordingly
governed and controlled by the decision announced in
case No. 11001, involving Mr. [Name], for the use of
Robert [Name] v. Boston Insurance Company of Boston,
Massachusetts; and for the reasons stated in said
opinion, the judgment of the Municipal Court is
reversed and the cases remanded with directions to
dismiss said Government proceedings on the merits
pursuant to the [Name].

REVEREND AND HONORABLE WITH DIGNITY.

TAYLOR, E. A. AND HOLLAND, J. J. JUDGES.

SHRAIBERG MFG. CO. for use of
ROBERT BACHRACH,

Appellee,

v.

LONDON & SCOTTISH ASSURANCE CORP.
LTD. OF LONDON, ENGLAND,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

This cause was taken and consolidated with cases, Nos. 31381, 31382, 31383, 31384, 31385, 31387, 31388, 31389, 31390 and 31391, and is accordingly governed and controlled by the decision announced in case No. 31381, Shraiberg Mfg. Co. , for use of Robert Bachrach v. Boston Insurance Company of Boston, Massachusetts; and for the reasons stated in said opinion, the judgment of the Municipal Court is reversed and the cause remanded with directions to dismiss said garnishment proceedings on the answer herein filed by the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

RECEIVED MAY 20, 1927
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Applicant

v.

LEWIS & BOOTH LUMBER CO.
INC. OF BOSTON, MASS.

Appellee

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 10, 1927.

MR. JUSTICE WILSON delivered the opinion of the

the court.

This cause was taken and consolidated with
cases Nos. 31361, 31362, 31363, 31364, 31365, 31366,
31367, 31368, 31369, 31370 and 31371, and is accordingly
referred and controlled by the decision rendered in
case No. 31361, *Chrysler Mfg. Co.*, for use of
Robert Mochison v. Boston Insurance Company of Boston,
Massachusetts; and for the reasons stated in said
opinion, the judgment of the Municipal Court is
reversed and the cause remanded with directions to
dismiss said attachment proceedings on the answer
herein filed by the defendant.

REVEREND JUSTICE WILSON WITH DISSENT.

TAYLOR, F. J. AND HOLLAND, J. CONCUR.

SHRAIBERG MFG. CO., for the use of
ROBERT BACHRACH,

Appellee,

v.

MASSACHUSETTS FIRE & MARINE INS. CO.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.
MR. JUSTICE WILSON delivered the opinion of
the court.

This cause was taken and consolidated with cases, Nos. 31381, 31382, 31383, 31384, 31385, 31386 31388, 31389, 31390 and 31391, and is accordingly governed and controlled by the decision announced in case No. 31381, Shraiberg Mfg. Co., for the use of Robert Bachrach v. Boston Insurance Company of Boston, Massachusetts; and for the reasons stated in said opinion, the judgment of the Municipal Court is reversed and the cause remanded with directions to dismiss said garnishment proceedings on the answer herein filed by the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

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FEDERAL TAX SERVICE IN CHARGE	ROBERT L. BROWN ATTORNEY MASSACHUSETTS FIRE & MARINE INS. CO. ATTORNEY
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the court.

MR. JUSTICE WILSON delivered the opinion of the court.

This cause was taken and consolidated with

cases, Nos. 11351, 11352, 11353, 11354, 11355, 11356, 11357, 11358, 11359, 11360, 11361 and 11362, and is accordingly

governed and controlled by the decision announced in

case No. 11351, *Shirley M. Co., for the use of*

Robert Brown v. Boston Insurance Company of Boston,

Massachusetts; and for the reasons stated in said

opinion, the judgment of the Municipal Court is

reversed and the cause remanded with directions to

dismiss said garnishment proceedings on the answer

hereto filed by the defendant.

REVEREND AND HONORABLE JUSTICE

TATUM, J. AND VOLNEY, J. JUDGES

SHRAIBERG MFG. CO., for the use of
ROBERT BACHRACH,

Appellee,

v.

NATIONAL SECURITY FIRE INS. CO.,
a corporation,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

This cause was taken and consolidated with
cases, Nos. 31381, 31382, 31383, 31384, 31385, 31386,
31387, 31389, 31390 and 31391, and is accordingly
governed and controlled by the decision announced in
case No. 31381, Shraiberg Mfg. Co., for the use of
Robert Bachrach v. Boston Insurance Company of Boston,
Massachusetts; and for the reasons stated in said
opinion, the judgment of the Municipal Court is
reversed and the cause remanded with directions to
dismiss said garnishment proceedings on the answers
herein filed by the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

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WASHINGTON, D. C.

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U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

Appellate

Opinion filed Oct. 12, 1937.

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FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

100 - 1111

This case was taken and consolidated with
cases, Nos. 1111, 1112, 1113, 1114, 1115, 1116,
1117, 1118, 1119 and 1120, and is accordingly
removed and controlled by the Division assigned in
case No. 1111, to wit: the U. S. for the use of
Justice, Department of Justice, Bureau of Investigation, at
Washington; and the present record is
retained, the contents of the original being in
retention and the case removed with direction to
division said Department proceedings as the Bureau
has filed by the defendant.

RECEIVED
FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

TAYLOR, T. L. AND HODSON, J. CORP.

SHRAIBERG MFG. CO., for the use of
ROBERT BACHRACH,

Appellee,

v.

NEW HAMPSHIRE FIRE INS. CO.,
a corp.,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

I Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

This cause was taken and consolidated with
cases, Nos. 31381, 31382, 31383, 31384, 31385, 31386,
31387, 31388, 31390 and 31391, and is accordingly
governed and controlled by the decision announced in
case No. 31381, Shraiberg Mfg. Co. , for the use of
Robert Bachrach v. Boston Insurance Company of Boston,
Massachusetts; and for the reasons stated in said
opinion, the judgment of the Municipal Court is
reversed and the cause remanded with directions to
dismiss said garnishment proceedings on the answer
herein filed by the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

258 - 31390

SHRAIBERG MFG. CO., for the use of
ROBERT BACHRACH,

Appellee,

v.

PATRIOTIC INSURANCE CO., a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion
of the court.

This cause was taken and consolidated with cases, Nos. 31381, 31382, 31383, 31384, 31385, 31386, 31387, 31388, 31389 and 31391, and is accordingly governed and controlled by the decision announced in case No. 31381, Shraiberg Mfg. Co., for the use of Robert Bachrach v. Boston Insurance Company of Boston, Massachusetts; and for the reason stated in said opinion, the judgment of the Municipal Court is reversed and the cause remanded with directions to dismiss said garnishment proceedings on the answer herein filed by the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

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WASHINGTON, D.C.	

I Opinion filed Oct. 19, 1927.

MR. JUSTICE BRIDGES delivered the opinion.

of the court.

This cause was taken and consolidated with cases Nos. 21321, 21322, 21323, 21324, 21325, 21326, 21327, 21328, 21329 and 21330, and is accordingly governed and controlled by the decision announced in case No. 21321, *Grainberg Mfg. Co.*, for the use of Robert Johnson v. Boston Insurance Company of Boston, Massachusetts; and for the reason stated in said opinion, the judgment of the Municipal Court is reversed and the cause remanded with directions to dissolve said preliminary proceedings on the answer herein filed by the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

SHRAIBERG MFG. CO., for the use of)
ROBERT BACHRACH,

Appellee,

v.

THE ROYAL EXCHANGE ASSURANCE CO.,)
a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion
of the court.

This cause was taken and consolidated with
cases, Nos. 31381, 31382, 31383, 31384, 31385, 31386,
31387, 31388, 31389 and 31390, and is accordingly
governed and controlled by the decision announced in
case No. 31381, Shraiberg Mfg. Co., for use of
Robert Bachrach v. Boston Insurance Company of Boston,
Massachusetts; and for the reasons stated in said
opinion, the judgment of the Municipal Court is
reversed and remanded with directions to dismiss said
garnishment proceedings on the answer filed herein by
the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOEDOM, J. CONCUR.

APPELLANT	THE NEW YORK LIFE INSURANCE CO.
APPELLEE	WILSON
APPELLANT	WILSON
APPELLEE	THE NEW YORK LIFE INSURANCE CO.

Opinion filed Oct. 10, 1927.

MR. JUSTICE WILSON delivered the opinion

of the court.

This case was taken and consolidated with

cases Nos. 11281, 11282, 11283, 11284, 11285, 11286, 11287, 11288, 11289 and 11290, and is accordingly

governed and controlled by the decision announced in

case No. 11281, *Shelburne Mfg. Co.*, for use of

Robert R. Smith v. Boston Insurance Company of Boston,

Massachusetts; and for the reasons stated in said

opinion, the judgment of the Massachusetts Court is

reversed and remanded with direction to dismiss said

proceedings on the answer filed herein by

the defendant.

REVERED AND REMANDED WITH DIRECTION.

316 - 31448

HARRY MILLER, et al,

Appellees,

v.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

ANDREW X. SORENSON,

Appellant.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

The appellant, Andrew X. Sorenson, was the owner of a certain piece of property located at 1500 North Fairfield Avenue, Chicago, Illinois, and on the 15th of May 1923, entered into a written contract with appellees for the sale of said property. The contract provided that the purchase price was to be \$45,000, subject to a first mortgage of \$15,000, due on or about November 1, 1923, with interest at 5½ per cent. Subject also to a second mortgage of \$6,500, with interest at 6 per cent, and which was payable at the rate of \$350 per month, according to the contract. The vendees paid down under this contract \$1,000 as earnest money, and further agreed to pay \$10,000 on the delivery of the deed, and to continue payments at the rate of \$300 per month, until the property was finally paid for. The contract further provided that the first payment was to commence when the second mortgage had been paid up with interest thereon. After the contract had been entered into by both parties it appeared that the partial payments on

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Oct 13, 1947

the existing mortgage accrued at the rate of \$750 each month instead of \$350, and that a final payment of \$2,050 was due in November, 1923, instead of continuing at \$350 each month until fully paid. By reason of the error in the drawing of the contract, further negotiations were entered into which resulted in a mortgage of \$22,000 being placed against said property to replace the \$15,000 mortgage, and this mortgage was placed through the Keystone Trust & Savings Bank, at which bank the appellant Sorenson had a considerable deposit. It further appears from the testimony that the appellees, at the time of the execution of the \$22,000 mortgage, by them as vandeens, paid \$220 as a commission for said loan to said bank for the procuring of said \$22,000 mortgage. It is contended by appellees and denied by appellant at the trial below that, as a matter of fact, the \$22,000 loan was made by Sorenson through the bank, and that he, in fact, obtained the commission. It is further contended, and the evidence shows that, as a matter of fact, appellees paid interest on the \$15,000 mortgage from July 19, to November 25, 1923, which amounted to \$222.75. This payment of interest on the \$15,000 mortgage was made to prevent a foreclosure, although it is contended that appellant under the arrangement had agreed to pay the interest on this mortgage. The verdict below and the judgment entered thereon was for the sum of \$1,182.75, and it is made up of the items of interest on said mortgage and the commission paid to the bank.

There appears to be but three questions of importance raised by appellant in this court. First; that no recovery could be had under the common count; second, that the mortgage

the existing mortgage amount of the sum of \$100,000 was
made instead of \$100,000, and also a small interest of \$1,000
was due in November, 1925, instead of November of 1924.
and much more fully said. By reason of the same in the
showing of the account, further negotiations were entered
into with management in a mortgage of \$100,000 being placed
against said property to replace the \$100,000 mortgage.
and this mortgage was placed upon the property being
Bridges Road, at which time the original mortgage had a
nominal value of \$100,000. It further appears that the fact-
that was the original, at the time of the mortgage of
the \$100,000 mortgage, by then as stated, said fact was a
nominal fact which is said that the mortgage
of said \$100,000 mortgage. It is stated by evidence and
being by affidavit of the first fact, as a matter
of fact, the fact was made by evidence that the
fact, and that is, in fact, showed the mortgage. It is
further stated, and the witness says that, as a matter
of fact, said fact was made by the fact that the
July 15, in November 1925, which occurred in 1925.
This mortgage of interest on the fact, the witness says that in
before a foreclosure, which is in evidence with regard
and under the mortgage it appears to say the interest on
this mortgage. The mortgage being the mortgage which
amount was the sum of \$100,000, and it is said to be the
issue of interest on said mortgage and the mortgage being in
the fact.

There appears to be some question of interest-
that interest is payable in fact. That is, the mortgage
will be paid when the mortgage is paid, and the mortgage

was made by the bank and that there is not sufficient evidence to show that the commission was received by Sorenson or the loan made by him; and third, that the court should have granted a new trial, by reason of the fact of newly discovered evidence which was presented in the form of affidavits, on the motion for a new trial.

As to the first of these contentions this court is of the opinion that where a person dealing with another makes a loan through an agency, and himself receives the commission, without disclosing that fact to the borrower, he is not entitled to the commission, particularly where the parties were dealing with each other, as in this case, and the commission was not intended as part of the consideration obtained by the vender. Under the circumstances the common counts would lie. As to the second contention of counsel for the appellant, this court finds that there is ample evidence to support the contention of appellees that the loan was, in fact, made by Sorenson and that the bank was acting only as intermediary, and did not receive the commission, but, in fact, refused to advance this amount of money on the property, as a bank loan. As to the third contention, this court is of the opinion that the evidence sought to be presented as newly discovered, was not, in fact, newly discovered evidence but was known to appellant at the time of the trial and prior thereto, and should have been procured and presented at that hearing.

For the reasons above given, the judgment will be affirmed.

JUDGMENT AFFIRMED.

TAYLOR, F.J. and HOLDEN, J. CONCUR.

THE STATE OF NEW YORK, County of [] ss. I, the undersigned, Clerk of the said County, do hereby certify that the within and foregoing is a true and correct copy of the original of the same, as the same appears from the records of the said County.

As to the time of these conversations this
would be at the office of the witness at the
office where a long time ago, and I will not
be mentioned, without disclosing that to the witness
he is not entitled to the conversation, especially where
the parties were dealing with each other, as in this case,
and the conversation was not intended as part of the evidence
which obtained by the witness. Under the circumstances the
conversations would be, as to the second question of
evidence for the defendant, this would be the only
evidence of the conversation at the office of the
the fact was, in fact, made by the witness and that the fact
was being said by the defendant, and it was being said
consequently, that is best, witness to witness that would
it may be the property, as a fact, as to the fact
consequently, this would be at the office of the witness
ought to be presented as being of course, and not, in fact,
being disclosed by the witness, but would be disclosed as to
the fact of the fact and other facts, and would be the fact

of 2.11e-5, suggesting that the model is well specified.

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336 - 31468

EMANUEL PETERSON, Administrator
of the Estate of Olaf Roland
Peterson, Deceased,

Appellant,

APPEAL FROM

v.

SUPERIOR COURT,
COOK COUNTY.

THE BALTIMORE AND OHIO CHICAGO
TERMINAL RAILROAD, a corporation,

Appellee.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

The facts in this case show that on August 16,
1923, appellant's intestate, employed by the appellee,
was engaged in the work of attending to the oil and
signal lamps along the right of way of the company, in
the vicinity of 14th and Robey streets in the City of
Chicago. The appellee was a railroad company operating
freight trains only, and did not carry passengers nor operate
passenger trains. The deceased met his death at a station
located at 63rd street, which was some distance from the
point where he was supposed to be employed. It appears
that at the time of the accident the train was moving at the
rate of 12 or 15 miles an hour past the station in question,
and that there were other tracks running parallel to each
other past the station, and that there was a runway between
the tracks, consisting of two planks, over which it was
customary to run tracks used for the purpose of conveying
baggage to and from passenger trains, operated over these

810.1142

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GENERAL INVESTIGATION OF THE CASE OF THE MISSING PERSONS	1. The first of the missing persons was a woman named Mrs. J. H. Smith, who was last seen on the morning of the 15th of the month.
2. The second of the missing persons was a man named Mr. J. H. Smith, who was last seen on the morning of the 15th of the month.	3. The third of the missing persons was a woman named Mrs. J. H. Smith, who was last seen on the morning of the 15th of the month.
4. The fourth of the missing persons was a man named Mr. J. H. Smith, who was last seen on the morning of the 15th of the month.	5. The fifth of the missing persons was a woman named Mrs. J. H. Smith, who was last seen on the morning of the 15th of the month.
6. The sixth of the missing persons was a man named Mr. J. H. Smith, who was last seen on the morning of the 15th of the month.	7. The seventh of the missing persons was a woman named Mrs. J. H. Smith, who was last seen on the morning of the 15th of the month.

Opinion filed Oct. 19, 1937.

Mr. J. H. Smith was the first of the missing persons.

The second.

The third is the man who was last seen on the morning of the 15th.

Mr. J. H. Smith was the first of the missing persons.

Two persons in the case of the missing persons were last seen on the morning of the 15th.

Three persons in the case of the missing persons were last seen on the morning of the 15th.

The fourth of the missing persons was a man named Mr. J. H. Smith, who was last seen on the morning of the 15th.

Five persons in the case of the missing persons were last seen on the morning of the 15th.

Six persons in the case of the missing persons were last seen on the morning of the 15th.

Seven persons in the case of the missing persons were last seen on the morning of the 15th.

Eight persons in the case of the missing persons were last seen on the morning of the 15th.

Nine persons in the case of the missing persons were last seen on the morning of the 15th.

Ten persons in the case of the missing persons were last seen on the morning of the 15th.

Eleven persons in the case of the missing persons were last seen on the morning of the 15th.

Twelve persons in the case of the missing persons were last seen on the morning of the 15th.

Thirteen persons in the case of the missing persons were last seen on the morning of the 15th.

Fourteen persons in the case of the missing persons were last seen on the morning of the 15th.

Fifteen persons in the case of the missing persons were last seen on the morning of the 15th.

tracks by other railroad companies.

On the day of the accident a truck had been left on this runway and it appears from the testimony that the tongue of the truck was left on the ground and was not hooked up against the end of the truck as was generally provided for. The deceased, on the morning of the accident, came running up the steps of the station and attempted to board one of the cars of the train but apparently decided he could not board this particular car and changed his mind and ran south along the southbound track, on which this train was operating, until he came to a gondola car, which he attempted to board while the train was in motion. It appears from the testimony that he succeeded in getting his foot on the step of this car and his hand on the grab-handle; and while in this position he came in contact with the truck and was killed.

The conductor of the train in question, which consisted of 80 or 70 cars, was on a refrigerator car six or seven distant from the engine. He testified that he saw the deceased running toward the train and that he whistled to him but that he apparently paid no attention. The conductor also testified that where he was located it was impossible for him to signal the engineer, and that after the accident, when he succeeded in getting a signal to the engineer of the train, which was a heavy one, it ran 120 to 150 feet before it came to a stop. He testified that when he saw the boy running toward the train the truck was 50 or 60 feet away. It would appear that in view of the distance it took the train to stop, after the signal was

given, and in view of the fact that it would have taken some time for the conductor to give a signal to the engineer, the accident would have taken place before the signal would have been effective. The conductor apparently did what he considered, and what might well be considered the proper thing, in trying to attract the boy's attention rather than to attempt to stop the train, under the circumstances as shown by the record.

It appears that there was nothing to interfere with the boy's view of the truck, which was forty or fifty feet from him as he was approaching the train.

It is insisted that it was the duty of the conductor to signal the train, in the first instance, and to stop it, when and if it became apparent that the boy was placing himself in a position of danger; and that his failure to do so was negligence. We cannot censure in this view of the situation. At the end of the testimony in the court below, the trial court directed a verdict in favor of the appellee. The general rule is that when the facts are admitted and all reasonable minds will agree that the injury was the result of the plaintiff's own negligence, the court may, as a matter of law, find that there was such contributory negligence on the part of the plaintiff as to defeat a recovery, and so inform the jury by a peremptory instruction. Haus v. C. & N. Y. R.R. Co., 217 Ill. 500, at page 503. There is nothing in the record that would indicate that the appellee had undertaken to furnish a means of conveyance for the deceased, to his place of work.

Nor is there anything in the record to indicate that the only way he had of reaching his place of employment, at 14th and Mabey streets, was by means of the trains of the appellee company. The conductor of the train was under no more obligation, under the circumstances of this case, to do other than he did. The freight train was not a carrier of passengers. The deceased was not a passenger. The surrounding circumstances were obvious and apparent. From the testimony it appears that he could have plainly seen the truck, and in addition to this he did not present himself in a proper manner for transportation, even if there had been an obligation to transport him.

The deceased at the time of the accident in question was 16 years of age. The Supreme Court of this state, in its opinion in the case of Austin v. Public Service Co. of Ill., 339 Ill. 113, at page 130, referring to a boy 14 years of age, said: "Deceased was old enough to know, and his experience in life was sufficiently broad to convince us that he did know, the danger attending the hazardous act of walking upright on a beam 14 inches wide and 34 feet above a rapidly flowing river, and there is no reason for excusing him from the same degree of care for his own safety which is required of an adult."

In the case at bar it appears that the deceased had gone to Tilden High School; was 16 years of age and had been working for this company since June of the year of the accident. It is insisted in the brief of appellant that the deceased boarded the train of the appellee company at the 23rd street station every morning between seven and

that in short nothing in the nature of influence over the
 only way he had of showing his sense of responsibility
 this was almost entirely, was up to him of the matter of
 the working out of the matter. The influence of the matter was
 over in most instances, unless the responsibility of the
 matter, as he would say to him. The things that he had
 a right to consider, the things that he had a right to
 the responsibility of the matter was over and over again.
 from the tendency of things that he would have to do
 over the matter, and in addition to this he had not to do
 himself in a proper manner for the matter, even if
 there had been no influence on the matter.

The tendency of the matter of the matter in
 condition was in part of the matter. The matter of the
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eight to go to his work. This, however, is not borne out by the testimony. The station agent at 63rd street testified that he had known the boy because he had gone to school with his son; that he had known him for about six months or a year; and that he was at the home of the agent, over the station, frequently, but that he did not know which of the railroads he was working for; that he sometimes saw him at the station waiting for a train but never saw him board one.

We see no force in the argument that it was the duty of the station agent, if he saw the boy run up the steps just prior to the accident, to warn him, because it would not be a fair inference to assume that the station agent would believe that he was about to board a train moving at 12 to 15 miles an hour in the manner in which he did. He testified that he, himself, did not see the accident.

From all the facts and circumstances in the case, we are of the opinion that the trial court properly directed a verdict and the judgment will be affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDEN, J. CONCUR.

right to go to his wife, John, however, is not going
 out by the morning. The woman about 40 years of age
 residing at 22 East 12th St. says she knows the man
 to whom she has been talking. She has known him for about
 six months or a year; and that he was at the time of the
 arrest, when she visited, presumably, but that he did not
 know him at the residence of the woman. She said that he
 sometimes saw him at the office of the woman.

It was on March 11, 1944, that the first of these
and only of the similar cases, in the New York
of the case that was in the evidence, in New York,
because it would not be a fair statement of the facts
the entire case would be in the evidence, in New York,
because a train moving at 10 to 15 miles an hour in the
center in which he was, he walked with him, himself,
and not with the evidence.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

374 - 31506.

LEO PEREIRA,

Appellse,

VICTOR PEARLMAN & COMPANY,
a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

Appellant, a corporation, was engaged in the business of selling and installing lighting fixtures, and its principal officers were Victor S. Pearlman, president, and his wife and daughter. These three constituted the entire organization.

The appellee, it appears, was a salesman employed by the company, and whose business it was to obtain contracts from the various concerns for the installation of these fixtures. He was employed from year to year under various written contracts or agreements. This employment lasted several years but the matters involved in this litigation are concerning commissions earned by him during the period covered by the years 1918, 1920, and 1921. This agreement, in effect, provided that he was to receive a commission of 10 per cent on all goods sold by him and which were shipped or delivered by appellant pursuant to these orders. There appear to be but four items involved. The first growing out of a claim for

THE COURT	APPEAL
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	APPEAL

Opinion filed Oct. 18, 1967.

MR. JUSTICE WILSON delivered the opinion of

the court.

Appellant, a corporation, was engaged in the business of selling and installing lighting fixtures, and the principal officers were Victor A. Thompson, President, and his wife and daughter. These three constituted the entire organization.

The appeal, it appears, was a business matter by the company, and these business it was to obtain contracts from the various companies for the installation of these fixtures. It was engaged from year to year under various written contracts or agreements. This equipment (which covered) years but the matter involved in this litigation are concerning equipment owned by him during the period covered by the years 1957, 1958, and 1959. This equipment, in itself, provided that he was to receive a commission of 10 per cent on all goods sold by him and which were shipped or delivered by appellant pursuant to those orders. There was to be no loss from involved. The first growing out of a claim for

\$1,326 on goods sold to the Trocadero Company, in Detroit, Michigan, on March 10, 1920. It appears from the testimony that this order was procured by appellee, and amounted to approximately \$32,000. It further appears that \$13,260 of this amount was shipped and delivered but that subsequent to the shipment the Trocadero Company became insolvent and the balance of the order was never shipped. It further appears from the testimony that the goods shipped were not fully paid for, and on May 1, 1920, an understanding, in writing, was had between the parties, which it is contended by appellant was a settlement of accounts existing between them and by this accounting appellee waived his right to commissions, evidently on the assumption that the goods not having been paid for he would not be entitled to his commission. Appellee, contends, however, that the amount was a liquidated amount and that under his contracts from year to year this amount was carried over. His contention is borne out, to some considerable extent, by the fact that in a statement rendered to him on May 2, of the same year, he was credited with commissions on this account. A further item is claimed by appellee for procuring a contract from the 16th Church of Christ Scientist, and it appears from a statement of the plaintiff company, dated March 6, 1923, that he was to have received credit for his commission for the procuring of this contract. The appellant objects, however, to the payment of this commission on the ground that the appellee later left the employ of the appellant company, and attempted to procure this contract for a rival concern by which he was then employed. This item amounted to \$449.85. Whatever the position may

11,200 on goods sold to the Transoceanic Company, in 1930, Michigan, on March 10, 1930. It appears from the testimony that this order was procured by appeal, and amounted to approximately \$11,200. It further appears that this order of this company was shipped and delivered but that shipment to the shipper the Transoceanic Company became identical and the balance of the order was never shipped. It further appears from the testimony that the goods shipped were not fully paid for, and on May 1, 1930, and under-stand, as stated, was not delivered and paid for, and it is contended by appeal that a settlement of account existed between them and by this accounting appeal gives him right to compensation, evidently on the assumption that the goods not having been paid for he could not be satisfied in his position. Appeal, however, states that the company was a limited liability company and that his position was that he was not a partner in the company. It is contended in these cases, to some considerable extent, by the fact that in a statement rendered to him on May 1, of the same year, he was credited with compensation on this account. A further item is claimed by appeal for procuring a contract from the Irish Church of Christ, Baltimore, and it appears from a statement of the plaintiff company, dated March 8, 1930, that he was to have received credit for his commission for the procuring of this contract. The appeal object, however, to the payment of this commission on the ground that the appeal later left the company of the plaintiff company, and attempted to procure this contract for a rival company by which he was then employed. This also occurred in 1930. However the position was

have been of appellee at the time he left the employ of the appellant, and regardless of what the ethics may have been concerning his course of conduct, the fact still remains that he did procure, in the first instance, or was the procuring cause of the contract carried out by the appellant company. Another item growing out of a contract with the Centennial Memorial Building of Springfield, does not appear to be worthy of much consideration, in view of the fact that his claim is based upon a clause in his contract, which provided if he assisted others in the procuring of any contract he was to receive one-half of the commission. The facts in this record do not clearly show that he rendered any material service, although this would be a question for the jury.

The verdict of the jury was for \$997.79. In view of the continuing relationship of the parties after the signing of the agreement of May 1, 1921, and the subsequent treatment of the Trocadero account in the statement of May 2, of the same year, and the apparent carrying over of commissions from year to year; and in view of the further fact that it would appear from the wording of the contract that the commissions were earned on goods shipped and delivered rather than on the collection of the account, we are of the opinion the matter, together with the 16th Church of Christ Scientist item, was properly submitted to a jury.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

have been of opinion at the time he left the office
of the appellant, and regardless of what the other
may have been concerning his course of conduct, the
fact still remains that he did procure, in the first
instance, and the present state of the matter
remains now by the appellant company. Interest from
proceeding out of a statement with the appellant company
of the appellant, and was given to be ready to work
in the office, in the office of the appellant, which was
the appellant's office in the office of the appellant, the
fact is that the appellant at the appellant, the fact is
that the appellant is not directly liable for the appellant
company's interest, although the fact is a question for
the jury.

The verdict of the jury was for \$1000.00. In
view of the appellant's testimony of the fact that
the signing of the agreement on May 1, 1911, and the
subsequent treatment of the appellant's account on the
statement of May 2, of the same year, and the appellant
carrying over all accounts from year to year; and in
view of the fact that it would appear from the
evidence of the contract that the appellant was not
on good faith and delivered to the appellant on the appellant
of the account, we are of the opinion that the appellant
with the fact that of the appellant's interest, and property
admitted to a jury.

The interest of the appellant will be

admitted.

386 - 31518

SIMON M. SKUDA,

Appellee,

v.

HUGO FEIS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion
of the court.

The facts in this case disclose that one Simon M. Skuda, appellee, on August 27, 1925, was driving a Pierce- Arrow, eight passenger limousine, going west on Douglas Boulevard, about the middle of the day; and the appellant, Feis, was proceeding in a southerly direction over and along Independence Boulevard, an intersecting boulevard in the City of Chicago, in Cook County. It appears from the testimony that a collision resulted, the car of appellee being struck on the rear right wheel by the car of appellant.

The case was submitted to a jury and a verdict in favor of the plaintiff was returned, in the sum of \$450, and judgment on that verdict was entered by the trial court. This court is asked to reverse that judgment for the following reasons: First; because under the statute a person driving along a highway has the right of way over another, approaching along an intersecting highway from the left; and that under

Opinion filed Oct. 19, 1937.

of the court.

from the testimony that a collision resulted, the car of applicant being struck on the rear right wheel by

January 1, 1900, at 10:00 a.m. for the first time.

On June 10, 1960, the vehicle was returned to the owner of the vehicle, who was advised by the police that the vehicle was not to be used for any other purpose.

the facts in this case it was the duty of the appellant ^{not} to proceed across said intersecting highway, if he saw the car approaching or was in a position to see it. Secondly; this court is asked to reverse this verdict because of the fact that the trial court erred in giving certain instructions to the jury, ignoring the rule of contributory negligence: and third; a new trial is asked for, because of remarks made by counsel for the appellee, particularly with regard to certain questions asked of appellant while he was upon the stand as a witness.

In regard to the first contention, it appears that the jury was instructed as to the language of the statute as to the right of way of persons approaching an intersecting highway, so that they had a right to consider this in arriving at their verdict in connection with the other facts in the case. In regard to the instructions of the court we find that the court did, in his instructions, cover the question of contributory negligence, and under the rule in this State, all instructions should be read and considered together, and are presumed to have been done so by the jury. While in the opinion of this court certain remarks of counsel during the trial were uncalled for and suggestive, nevertheless, they were stricken out by the court on motion of counsel

The facts in this case it was the duty of the jury to find, and the jury found that the defendant was negligent.

It is the duty of the jury to find the facts, and the jury found that the defendant was negligent.

It is the duty of the jury to find the facts, and the jury found that the defendant was negligent. The jury found that the defendant was negligent, and the jury found that the defendant was negligent.

In regard to the first contention, it

appears that the jury was instructed as to the law of the state, and the jury found that the defendant was negligent.

It is the duty of the jury to find the facts, and the jury found that the defendant was negligent.

It is the duty of the jury to find the facts, and the jury found that the defendant was negligent.

It is the duty of the jury to find the facts, and the jury found that the defendant was negligent.

for appellant, and the jury was instructed to disregard them. In our judgment, considering all the circumstances, they were not of sufficient moment to warrant the granting of a new trial.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

Taylor, P³J. and
Holdom, J. concur.

for judgment, and the law was interpreted in accordance
with it. It was judgment, maintaining all the same
principles of common sense and justice to the extent
the President is a law officer.

The judgment of the National Council will

be followed.

THE NATIONAL COUNCIL

Taylor, W. L. and
Hobson, J. L. present.

407 - 31539

ESTHER HELLINGER,

Appellee,

v.

REITA RICHARDSON and
CHARLES IRA WYNEKOOP

**

CHARLES IRA WYNEKOOP

Appellant

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

This is an action for personal injury brought by appellee, Esther Hellenger, against Reita Richardson and Charles Ira Wynekoop, defendants below. A trial before a jury resulted in a verdict in favor of appellee for \$4,000 against Charles Ira Wynekoop, one of the defendants below and appellant here, and a verdict finding the defendant below, Reita Richardson, not guilty. Judgment was entered on the verdict and from that judgment this appeal was perfected.

The facts disclose that appellee was riding as a passenger in a certain Overland sedan, driven by defendant below, Reita Richardson, and that this car came into collision with a Packard car driven by the chauffeur of appellant Wynekoop. The accident happened about seven thirty in the evening on February 27, 1924, at the intersection of Pine Grove avenue and Waveland avenue, two intersecting streets in the city of Chicago, Pine Grove avenue being a north and south street and Waveland avenue being an east and west street. It appears from the testimony

Opinion filed Oct. 19, 1937.

Journal of Management Studies, 19(6), 701-718.

1890

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 2691-2692, 2693-2694, 2695-2696, 2697-2698, 2699-2700, 2701-2702, 2703-2704, 2705-2706, 2707-2708, 2709-2710, 2711-2712, 2713-2714, 2715-2716, 2717-2718, 2719-2720, 2721-2722, 2723-2724, 2725-2726, 2727-2728, 2729-2730, 2731-2732, 2733-2734, 2735-2736, 2737-2738, 2739-2740, 27

Figure 4. (continued)

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

and the same, therefore, will be the same.

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and I thought I'd just had a little bit of a holiday.

„Auftraggeber und Auftragnehmer“

1. *U. lutea* (L.) (Yellow)

and several other important factors such as the following:

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Journal of Interpersonal Violence 28(10) 2013-2016

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Source: *Statistical Abstract of the United States*, 1992, Table 1201.

THE UNIVERSITY OF CHICAGO PRESS

of Emily Hellingner, daughter of appellee, that she was riding in the front seat of the sedan with the driver, Reita Richardson, who was a friend of hers, and that her mother, appellee herein who brings this suit, was at the time riding with them and was on the rear seat of the car; that they were proceeding eastward on Waveland avenue and that there were lights on the car driven by Miss Richardson, which car is hereinafter referred to as the Overland; that as they came to Pine Grove avenue and started to cross, she saw the Packard car belonging to the appellant, hereinafter referred to as the Packard, at a distance of probably fifty feet, coming in a northerly direction along Pine Grove avenue; that she told her companion they were going to be hit, and that Miss Richardson speeded up and tried to get ahead of the on coming Packard; the Overland was struck on the rear right side, and this witness stated the crash was terrific. Immediately after the accident appellee was placed in a Checker Cab, which was at or near the spot at that time, and taken to a hospital where she received treatment. This witness further stated that the Overland was about in the center of Pine Grove avenue when she saw the other car, possibly beyond the middle of the street, and that at the time she first saw the Packard it was about fifty feet south of the south line of Waveland avenue. McIntyre, the driver of the Checker cab, testified that he was fixing his car near the corner of Waveland and Pinegrove avenues and that he was at the southeast corner when he heard a machine passing "kind of fast;" and he saw the Packard passing and at the time the Overland was about in the middle of the intersection of the two streets; that after the accident he took the appellee

[illegible]

to the hospital; and that he did not see any lights on the Packard and did not believe there were any. He was corroborated in this by McFarland, a police officer who was in the vicinity and who arrived at the scene of the accident about a minute and a half after it occurred. He stated that he heard the crash and went over to the corner; that he found there, were no lights on the Packard; and that when he got there the Checker cab had left with the injured passenger. The co-defendant below, Reita Richardson, testified that when she came close to Pine Grove avenue she slackened her speed; that she had lived in the neighborhood for about thirteen years and knew it to be a dangerous crossing; that she looked in both directions when she started to cross and the street was clear; that after the accident she talked with the chauffeur of the Packard and he stated that he was in a hurry and was going to the doctor's office. The police officer also testified that there were skid marks at the point where the Packard car reached Waveland avenue, which appeared to be the skid marks of the Packard. On behalf of appellant, Andrew Schuler testified that he saw the Packard before the accident; that it was about 25 feet from the corner of Waveland; that it was going about 2 miles an hour and the Overland was going about 20 miles an hour; that when the chauffeur of the Packard came to Waveland avenue, he stopped and looked to see if any car was coming and then stopped a second time with the front end of the car almost in the center of the street; that the Overland did not drive in a straight line but turned

[illegible]

north, evidently to get away from the Packard; and that after the accident the front end of the Overland was facing south and the back end of it was facing north. On cross-examination this witness testified that he was the janitor of a building on the corner of Pine Grove avenue; that he was a patient of appellant and that he and his family had been such for about ten years. He also stated that there were lights on the Packard. Mrs. Lloyd, a witness for appellant, testified that she was at the northeast corner of Taveland and Pine Grove and heard the crash; that there were lights on the larger car; and that the Packard stopped at the south curb of Taveland avenue with the front wheels just over the line. She further testified that at the time she was on her way to attend a party given by a family named Simpson, who were also friends of Dr. Wyackeep. The chauffeur testified that he took the doctor to his office on the evening in question and reached there at seven fifteen; that the doctor told him to go from there to the garage and wait there for a call from him; that the garage was at 3618 North Halsted, three blocks from the office of appellant; that instead of doing that, he went to see a friend of his named Love who lived at 3618 Pine Grove avenue; that he was not there and the witness then went north on Pine Grove avenue. It further appears from the testimony that the doctor's office was about three or four blocks from the place of the accident; that it was north of the point in question and was in a direction which

could be reached by the chauffeur in the direction in which he was going. He further testified that at Waveland avenue he came to a standstill and looked east and west and did not see anything coming; that he was within three or four feet of the east side of Pine Grove; that he then started across and when he saw the other car and could not get out of the way, he swerved a little to the right. He also stated that the dash lights on the Packard were burning but that the headlights were not turned on; that the Overland did't have its headlights burning but that its dash lights were burning. There appears to be testimony to the effect that the Overland had no dash lights but was equipped with headlights only and a spot light. The defendant below, Reita Richardson, testified that the spot light was not lighted but the headlights were. The chauffeur denied that he was on his way to the doctor's office. He further testified that he was watching his speedometer at the time he was going north in Pine Grove avenue, and never went over 12 miles an hour. He further denied that the police officer had told him that he should turn on his lights, and also that he had told the officer that he had a hurry call from the doctor and had not turned on his lights at the time he started for the office. He stated further that he did not sound his horn. Appellant, Wynkoop, testified that his office hours were from 4:00 to 5:00 and from 8:00 to 9:00 and that when he got out of his car in front of his office he told the chauffeur to go straight to the garage and that he would call him

when he needed him.

Appellant presents to this court, as a reason for the reversal of the judgment below, the proposition that the driver of the Overland at the time of the accident was guilty of contributory negligence, and that the appellee, a passenger in the Overland, at the time was engaged in a joint enterprise with the driver of the car, namely, that they were bound for the same destination under an agreement to use the Overland car of the defendant below in the consummation of this joint enterprise. In this we are unable to concur. It is true they were bound for the same place and that the car was furnished by the defendant below, Miss Richardson, but it does not appear, in the opinion of this court, to be such a joint enterprise as would be contemplated in a case of this kind. If such were the fact, any person riding in a car would be bound by the act of the driver if they were bound for a common destination. The courts of this State have not proceeded along this line of attributing contributory negligence to such a person riding under such circumstances, and who was not himself in actual control of the car. The most that has been said is that if by the exercise of ordinary care, the person so riding could have avoided the accident, by calling the driver's attention to the situation in time to avoid the accident, that then such person might be guilty of contributory negligence. But there is no evidence of any kind showing that appellee was guilty of any negligence on her own part,

and her inability to recover, for this reason is based solely on the proposition that this case was one of joint enterprise. In this we fail to agree with counsel.

We are also asked to grant a new trial on the ground of the giving of Instruction No. 11, on behalf of appellee, which is an instruction dealing with the rights of persons approaching a street intersection. Instruction No. 10, given on behalf of appellant, defines the rights of the parties in the words of the statute, and we find nothing in Instruction 11 which we would consider as reversible error.

The principal ground of reversal relied upon, however, is the fact that at the time of the accident, the chauffeur, Merritt, employed by appellant, was not engaged in the line of his employment and that, therefore, appellant, the owner of the car and undisputedly the employer of the chauffeur, would not be responsible. Appellant in addition to filing a plea of the general issues below, filed a special plea denying that at the time of the accident either he or any of his agents or employees were in charge of said automobile; or that any agent or employee was operating same for or on behalf of the defendant. And under this plea it is insisted that while it is true that the chauffeur was employed by appellant and paid by him, and had been with him for several years, that, nevertheless, at the time of the accident, he was engaged on his own business and not that of his employer, and

and was directed to remain, for this reason
it would simply be the proposition that this man
was not to be taken advantage of. In fact he told me
about this woman.

"He was afraid to leave a man alone in
the house at the time of the investigation. He told me
about the woman, which is an interesting thing
with the report on the woman's behavior. I never
before. The woman told me that she was in the house
before, before the time of the investigation in the
house at the time, but she said she was in the

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that the court should have directed a verdict at the close of the testimony, in favor of appellant. Counsel cite numerous cases in their brief and we do not quarrel with the position that as a general rule in this State it is the law that the master will not be ^{held} responsible for accidents caused by an automobile, where the servant driving the same at the time of the accident was not engaged in the business of his employer but was engaged on business of his own, beyond and outside the scope of his employment. It is insisted, moreover, by counsel for appellant that as soon as this fact appeared, any presumption as to the ownership, control and management of the car, by reason of the establishment of the fact that the driver was employed by the owner, should disappear, and that there would be but one thing left for the court to do and that would be to instruct the jury in favor of the defendant below. If this were the true rule, it might be impossible to attach liability to the owner of a car, under any circumstances, unless the driver was clearly and strictly engaged in the master's business, but in our opinion, this rule is not so strictly construed. The facts in this case show that the driver of the Packard car had been in the employ of the appellant for a number of years. The driver, himself, was not a party to the litigation, so consequently did not have to fear the obtaining of a judgment against him, nor was there any evidence that he would be able to respond in case any such judgment were entered. We cite this fact simply as bearing on the question of the probability or

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improbability of the testimony of the chauffeur and the owner and that the jury had the right to consider this in weighing the testimony. Moreover, under the circumstances of this case, it appears that the accident happened within 15 minutes, more or less, after the chauffeur had left his employer and within a short distance of both the office and the garage; and that at the time of the accident he was headed in the direction, which, if properly carried on, would have taken him to the office of appellant, without going out of his way. And we cannot say as a matter of law that the evidence was so clear and uncontradicted on this issue that it ceased to be a question of fact for the consideration of the jury, and that the case should be reversed, as a matter of law. This court in its opinion in Kavale v. Horton Salt Co., 342 Ill.^{App} 208, at page 210, says:

"The defendant contends that the court should have directed a verdict in its favor as requested, for the reason that the evidence discloses that at and prior to the time of the accident, the chauffeur was acting outside of the scope of his employment; that he was not pursuing any purpose of the defendant. The plaintiff admits that if the evidence showed this fact to be as the defendant contends, no recovery could be had. But plaintiff contends that he having made out a prima facie case, under no state of facts would the court be warranted in instructing for the defendant. We think the contention of the plaintiff in this respect is contrary to the law. Plaintiff made out a prima facie case by proving that he was in the exercise of ordinary care for his own safety, and was struck and severely injured through the negligence of the driver of defendant's truck and by further invoking the presumption which the law raises from the facts of ownership of the truck and employment of the driver to the effect that the truck was being used pursuant to the defendant's business at the time in question.

Plaintiff offered no direct evidence on the question whether the truck was being driven at the time in question by the chauffeur in the course of his employment; so that plaintiff's case rested on the presumption of this fact. If in this state of the record the defendant then put in evidence of such a character that would lead all reasonable minds to conclude that the truck was not being driven on defendant's business, then a directed verdict would be proper. Foster v. Wadsworth-Hewland Co., 168 Ill. 514. The presumption in such a case would be entirely destroyed by the evidence. But the plaintiff further contends that the evidence in the record is such that the question whether the chauffeur was driving the truck on a frolic of his own or in connection with the business of the defendant, was a question of fact for the jury. We think this contention is borne out by the record. "We think that whether the chauffeur was driving the truck at the time of the accident in connection with defendant's business was a question for the jury. They might find that although he 'was serving defendant badly, defendant was liable.'"

Under the circumstances of this case, we feel that the matter was properly submitted to the jury. We find further that there was no error in the record such as would be considered as reversible error, and therefore, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

Taylor, F.J. and
Heldem, J. concur.

JEANNETTE BUCKLEY, and
 PHILIP WEINSTEIN, Administrators
 of the Estate of Paul E. Buckley,
 Deceased,

Appellees,

v.

MANUEL BROTHERS,
 a Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed Oct. 19, 1927.

MR. JUSTICE WILSON delivered the opinion
 of the court.

It appears from the record that the deceased, Paul E. Buckley, on the 18th of October, 1920, was a motorcycle police officer, connected with the Police Department of the Village of Homewood. On the day in question he was stationed at the Village of Homewood on the Dixie Highway, with his motorcycle. It appears that north of Homewood and at approximately 145th street, there was a one way traffic point, and that a certain officer named Kistner, also a motorcycle police officer, was engaged in directing traffic, and that while there, according to his testimony, a car ignored his signal and speeded south at a fast rate of speed; and that he pursued this car through Homewood and over and along the Dixie Highway. It appears further from the testimony that he motioned to Officer Buckley, who mounted his motorcycle and caught up with Officer Kistner, both proceeding southward along the Dixie Highway and out of

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Opinion filed Oct. 19, 1937.

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and beyond the limits of the Village of Homewood. Kistner further testified that he asked Buckley if a red touring car had gone through, and he had answered yes, whereupon Kistner stated that he wanted to catch it. Both proceeded southward, with Buckley in the lead thirty or forty feet, along the roadway, which, at this point was approximately 18 feet wide and a concrete cement road. The evidence would indicate that they were traveling about 40 miles an hour. Located south of Homewood and upon the Dixie Highway there was the home of one Sabath. There was a gate entrance to the grounds, approximately 15 feet from the edge of the pavement; and outside of the fence and along the fence, there appears to have been considerable foliage. On the day in question, a truck belonging to appellant, had been delivering goods at the Sabath home and had then proceeded out through the grounds, through the gateway and out upon the roadway until the front end of the truck extended a considerable distance across the roadway. There is a conflict in the testimony as to just how far it extended. The driver of the truck testified that it was about half way across the road, and Officer Kistner testified that it was so far across that it was impossible for a motorcycle to get by. The point in question was about a mile south of the Village of Homewood, and the testimony discloses that there was no other traffic upon the road at this time and that there was nothing to obstruct the view of

and beyond the limits of the village of Homestead.
 History further reveals that he asked permission
 to a red building and had gone through, and he
 had answered yes, whereupon history stated that he
 wanted to enter it. Both physicians continued, and
 Sunday in the last thirty or forty feet, along the
 roadway, which, at this point was approximately 15
 feet wide and a concrete cement walk. The evidence
 would indicate that they were traveling about 10 miles
 an hour. Located south of Homestead and near the
 Ohio Highway there was the home of one Smith. There
 was a gate entrance to the grounds, approximately 15
 feet from the edge of the pavement and outside of the
 fence and along the fence, there appears to have been
 considerable foliage. On the day in question, a truck
 belonging to applicant, had been delivering goods at the
 Smith home and had been surrounded and through the
 grounds, through the gateway and onto the roadway
 until the front end of the truck entered a considerable
 distance across the roadway. There is a conflict in
 the testimony as to how far the truck traveled. The
 driver of the truck testified that it was about half way
 across the road, and Officer Martin testified that it
 was in the middle of the road at the intersection and a witness
 to the fact. The point in question was about a mile south
 of the village of Homestead, and the following witnesses
 that there was no other building upon the road at that
 time and that there was nothing in the way of the truck.

the road, either to a person approaching the place in question or to the person at the place in question upon the road, looking north. Fietner testified that as the truck swung out into the roadway it had not yet made a complete turn toward the south when the motorcycle, driven by the deceased, came in collision with the side of the truck, but that there was no room for Buckley to pass. Officer Fietner, who was following about 30 or 40 feet behind Buckley, according to his testimony, went into the ditch in order to avoid striking the truck.

As a result of the collision, Buckley was killed. The trial resulted in a verdict in favor of the appellees, for \$3500, and judgment was entered upon the verdict. To reverse that judgment this appeal was perfected.

It is argued by appellant that the declaration in question consisted of one count which charged that appellant negligently, carelessly and improperly ran, drove and managed this truck so that the same ran into and against the deceased, and that the evidence shows that, as a matter of fact, the deceased ran into, against and collided with the truck, and that, therefore, the proof was not in conformity with the declaration. We are unable to agree with this position of counsel. The declaration charges the careless and negligent management of the truck, and this, in our opinion, is the direct ground upon which the negligence charge is based. It would be a refinement of pleading, in the case of a collision between two such instrumentalities to differentiate between the facts as to whether the truck ran into the motorcycle or the motorcycle ran into the truck. The real question at issue,

the body, either in a position of repose or in a position of action, is determined by the position of the head in relation to the trunk, and the position of the trunk in relation to the feet. The position of the head is determined by the position of the neck, and the position of the neck is determined by the position of the shoulders. The position of the shoulders is determined by the position of the arms, and the position of the arms is determined by the position of the hands. The position of the hands is determined by the position of the fingers, and the position of the fingers is determined by the position of the thumb. The position of the thumb is determined by the position of the wrist, and the position of the wrist is determined by the position of the forearm. The position of the forearm is determined by the position of the elbow, and the position of the elbow is determined by the position of the upper arm. The position of the upper arm is determined by the position of the shoulder, and the position of the shoulder is determined by the position of the scapula. The position of the scapula is determined by the position of the spine, and the position of the spine is determined by the position of the pelvis. The position of the pelvis is determined by the position of the hips, and the position of the hips is determined by the position of the knees. The position of the knees is determined by the position of the thighs, and the position of the thighs is determined by the position of the legs. The position of the legs is determined by the position of the feet, and the position of the feet is determined by the position of the toes. The position of the toes is determined by the position of the phalanges, and the position of the phalanges is determined by the position of the metatarsals. The position of the metatarsals is determined by the position of the tarsals, and the position of the tarsals is determined by the position of the calcanei. The position of the calcanei is determined by the position of the heels, and the position of the heels is determined by the position of the soles of the feet. The position of the soles of the feet is determined by the position of the ground, and the position of the ground is determined by the position of the earth. The position of the earth is determined by the position of the sun, and the position of the sun is determined by the position of the stars. The position of the stars is determined by the position of the universe, and the position of the universe is determined by the position of the God.

under the pleading, is whether the truck was so negligently operated and managed as to result in the accident.

It is further argued by appellant that the deceased at the time of the accident was, himself, not in the exercise of ordinary care for his own safety. The accident in question happened outside the limits of the Village of Homewood and on the State Highway. To believe, from the testimony, that the deceased at the time of the accident was in the pursuit of an offender and was in the discharge of his duty. It would be necessary to consider his actions with reference to his official capacity, rather than to apply the same rule that would apply to a private individual. A rate of speed employed by a motorcycle policeman in the discharge of his duties, would not be governed by the same rules as would apply in ordinary circumstances.

It was the evident intention of the legislature, in enacting the Motor Vehicle Act, to exempt police officials from certain of its provisions. The Act itself, chapter 95a, Cahill's Illinois Statutes - 1927, paragraph 34, section 3, provides as follows: "In all cases, police vehicles, fire departments, vehicles transferring United States mail, and ambulances, shall have the right of way over other vehicles." It would be practically impossible for an officer to effect an arrest of a speeder, if the officer, himself, was required to observe the speed laws in his efforts to make the arrest.

It does not appear that any horn was blown or signal given at the time the truck moved out into the roadway, and it was a question of fact for the jury whether or not the deceased, proceeding at the pace at which he was going, had sufficient time to avoid the collision, and this court is not inclined to disturb the verdict in that regard. A somewhat significant fact in connection with the testimony is that the officer following the deceased was also compelled to leave the roadway, on his motorcycle, in order to avoid a similar collision.

For the reasons stated, the judgment of the Circuit Court will be affirmed.

JUDGMENT AFFIRMED.

Taylor, W.J. and
Melson, J. concur.

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32053

BELL & GOSSETT COMPANY, a corporation,
J. Edward Erbanbrack and George
F. Paul,

Appellees,

v.

GUNNER OLSON and EUGENE H. KEHL, Individ-
ually and as co-partners trading under
the firm name and style of Olson-Kehl Co.,
not inc., a co-partnership,

Appellants.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT,
COOK COUNTY.

Opinion filed Oct. 26, 1927.

MR. JUSTICE HOLDOM delivered the opinion of the
court.

This is an appeal from an interlocutory order granting a temporary injunction in a bill brought by complainants against the defendants to enforce complainants' rights under an agreement between the parties, dated January 14, 1925.

Complainants J. Edward Erbanbrack and George F. Paul are the inventors, and Bell & Gossett Company are the manufacturers of "partition type submerged indirect water heaters"; the said heaters were protected by the inventors by letters patent issued by the United States. The agreement granted the defendants the exclusive right and license to sell anywhere in the County of Cook, Illinois, and the County of Lake, Indiana, under terms specified, "partition type submerged indirect water heaters", and the right to install the same throughout the aforesaid territory, and the defendants, as such licensees "recognized the validity of each and every of said patents for the life of this contract",

346-1-814

1000

WILL & JENNETT CHASE, & COMPANY
ATTORNEYS AT LAW
CHICAGO, ILL.

Plaintiffs

v.

JOHN W. HUNTER and JOHN E. HUNTER, Individually and as co-defendants
JOHN W. HUNTER and JOHN E. HUNTER, as co-defendants
JOHN W. HUNTER and JOHN E. HUNTER, as co-defendants
JOHN W. HUNTER and JOHN E. HUNTER, as co-defendants

Defendants

Opinion filed Oct. 28, 1937.

MR. JUSTICE HUGHES delivered the opinion of the

court.

This is an appeal from an interlocutory order granting a temporary injunction in a bill brought by plaintiffs against the defendants to enforce compliance with the order as previously entered in the case, dated January 14, 1937.

Defendants are the owners and operators of

plants and the inventors, and will & JENNETT CHASE and the manufacturers of "peristaltic type submerged liquid water heaters"; the said heaters were protected by the invention by letters patent issued by the United States. The respondents granted the defendants the exclusive right and license to sell and operate in the County of Cook, Illinois, and the County of Lake, Indiana, and to use specified "peristaltic type submerged liquid water heaters", and the right to install the same throughout the aforesaid territory, and the respondents, as such licensees, recognized the validity of each and every of said patents for the life of this contract.

and the defendants further agreed to buy from the Bell & Gossett Company, the manufacturers of said heaters, and said company agreed to sell to said defendants certain quantities of said heaters specified therein during certain times in said agreement specified; and defendants agreed to pay to Bell & Gossett Company for such heaters according to prices scheduled in said agreement, which also provided for the manner of payment for such heaters, and they further agreed to allow the Bell & Gossett Company to examine their books of account and records and take data therefrom in the event of abreach of the contract, etc. There are many other conditions in the agreement governing the relations of the parties which are not necessary to be here mentioned for the purpose of this opinion.

The bill avers that defendants are now in arrears in making payments under the contract, and that on December 14, 1926, Bell & Gossett Company demanded of defendants the right to examine their books of account and records aforesaid, and that defendants refused to comply with such demand, and stated that they would accept the advice of their lawyer "to violate the terms of said contract" so far as the examination of the books of account and records of said defendants was concerned, and further charging that without authority or license from the complainants, or the Bell & Gossett Company, defendants have been manufacturing said heaters and selling the same to buyers in the territory of Cook County, Illinois, and Lake County, Indiana, and that they refuse to desist from further manufacturing said heaters; that said Bell & Gossett Company are the exclusive manu-

and the defendant further agreed to pay from the Bell & Gossett Company, the amount of said contract, and said company agreed to sell to said defendant certain quantities of said pumps specified in said contract, and in this agreement specified and defendant agreed to pay to Bell & Gossett Company for such pumps according to prices specified in said agreement, and also provided for the amount of interest for such pumps, and that they agreed to allow the Bell & Gossett Company to examine their books of account and records and take from them in the event of breach of this contract, etc. Therefore many other conditions in the agreement governing the relation of the parties which are not necessary to be here mentioned for the purpose of this opinion.

The bill avers that defendant etc. was in breach in making payments under the contract, and that on December 15, 1904, Bell & Gossett Company advised its defendant etc. right to examine their books of account and records etc., and that defendant refused to comply with such demand, and stated that they would accept the advice of their lawyer "to violate the terms of said contract" so far as the examination of the books of account and records of said defendant was concerned, and further charging that without authority or license from the complainant, or the Bell & Gossett Company, defendant have been manufacturing and selling and selling the same to others in the territory of Cook County, Illinois, and also in Cook County, Illinois, and that they refuse to desist from further manufacturing said pumps; that said Bell & Gossett Company are the exclusive manu-

facturers of said heaters under a license agreement from the inventors, their co-complainants. Complainants ask that defendants, individually and as partners under the name of Olson-Kehl Company, their agents, etc., be restrained and enjoined from removing any of the books of account and records of Olson-Kehl Company concerning the installation of all heaters made by them since January 14, 1925, and restraining them from altering, changing or in any way destroying any of said books or records, until the further order of the court, and that defendants be decreed to pay to complainant Bell & Gossett Company, "the sum of \$1592.69, and that execution issue therefor;" that an account be taken under the direction of the court of the heaters sold by defendants since January 14, 1925, and that defendants be decreed to pay complainant Bell & Gossett Company a sum of money equivalent to Bell & Gossett Company's profits thereon, and also a sum of money for damages to said Bell & Gossett Company by reason of the wrongful manufacture of heaters by said defendants, and for other and further relief. The bill is duly verified by the oaths of J. Edward Ercanbrack and E. J. Gossett.

To this bill the defendants interposed a general and special demurrer, which upon hearing by the chancellor on June 13, 1927, was overruled, and defendants were given leave to answer the bill on or before July 9, 1927.

Before the coming in of the answer of defendants, and on July 6, 1927, upon notice duly given to defendants of an application for a temporary injunction "and the court

Examination of said records under a license agreement with
the Government, their confidential informant, confidentially
and independently and on various dates in 1937, in 1938
name of Edward Louis Gurney, their agent, etc., in 1937
trained and obtained from receiving any of the books of
Gurney and records of Edward Louis Gurney concerning the
production of all records made by them since January 14,
1937, and retaining them from January 14, 1937, until the
any way destroying any of said books or records, until the
further order of the court, and that defendants be decreed
to pay to complainant \$111,750.00, "the sum of
\$111,750.00, and that execution issue thereon" that on
account be taken under the direction of the court of the
records sold by defendants since January 14, 1937, and
that defendants be decreed to pay complainant \$111,750.00
Gurney a sum of money equivalent to \$111,750.00 Gurney's
profits thereon, and also a sum of money for damages to
said \$111,750.00 Gurney by reason of the wrongful man-
agement of records by said defendants, and for other and
further relief. The bill is duly verified by the oath
of J. Edward Eubank and W. J. Gurney.

To this bill the defendants answered a general
and special demurrer, which upon hearing by the court
on June 17, 1937, was overruled, and defendants were given
leave to answer the bill on or before July 8, 1937.
Before the coming in of the answer of defendants,
and on July 8, 1937, upon notice duly given to defendants
at an audience for a temporary injunction and the court

having read said bill of complainant, and being duly advised in the premises" it was ordered that the defendants, individually and as partners, etc., be enjoined and restrained, until the further order of the court, from manufacturing or causing to be manufactured or assisting in or promoting the manufacture in any way, directly or indirectly, either individually or as partners, of any of the heaters aforesaid, covered and described in the contract of January 14, 1935, upon the filing of an injunction bond in the penalty of \$8,000 with good and sufficient surety to be approved by the court. From this temporary injunctive order defendants prayed and perfected this appeal.

(Counsel for defendants have grossly failed to comply with the rule of this court regarding abstracting the record before us. It is not abstracted, the bill and the contract with the accompanying affidavits are set forth in haec verba. If we enforced the rule, as we might, and maybe should, we would strike the so-called abstract from the record. We admonish counsel not to offend in like manner again.)

Defendants contend that the bill is not properly verified. An examination of the affidavits verifying the bill impels us to the conclusion that the verification meets every legal requirement.

In the condition of this record, the only matter presented for our consideration, is, whether from the material averments of the bill, which stand confessed by the inter-

position by defendants of their general and special demurrer, it is sufficient to support the temporary injunction granted by the chancellor. Counsel have argued the facts of the case. The facts are not before us for our determination, - simply the validity of the injunctive order, and to a consideration of that order we shall restrict this opinion.

It is clear that the rights of the parties under the contract of January 14, 1925, only are presented for judicial determination. The validity of the patents under which the heaters are manufactured, the subject-matter of the contract in question, is not involved. The contract itself admits the validity of the patents. Therefore as the question of the patents is in no wise involved in this litigation, the state courts have jurisdiction. It would be otherwise, however, were the question of the validity of the patents in any way, shape or manner questioned. Under the covenant in the contract admitting the validity of the patents it may be that defendants would be estopped even in the federal court from challenging their validity. As said in Forster v. Brown Hoisting Mach. Co., 286 Ill. 267: "Suits to recover royalties for the use of patents, suits for the specific performance of contracts for their use and suits on contracts governing the rights of the parties in the use of a patented invention has been held not to be suits under the patent laws, and in such actions state courts have jurisdiction."

In Lockett v. Belpark, 270 U.S. 498, there will be

found a full discussion of this proposition where the distinctions regarding federal and state jurisdictions are clearly pointed out. In this case Mr. Chief Justice Taft held: "It is a general rule that a suit by a patentee for royalties under a license or assignment granted by him, or for any remedy in respect of a contract permitting use of the patent is not a suit under the patent laws of the United States, and can not be maintained in a federal court as such." (Citing cases).

We think from the averments of the bill, which are not challenged, that a clear case is shown for equity jurisdiction and relief by way of injunction as prayed. The defendants are charged with manufacturing the patented heater without any right so to do and in contravention of the property rights of the complainant Bell & Gossett Company, who have the exclusive right granted to it by the patentors to manufacture the heater. The refusal of defendants to permit access to their books of account regarding the sale, as well as the manufacture of the heaters, is likewise a cause for the intervention of a court of equity. The conditions set forth in the bill would make it necessary for an accounting between the parties to determine what amounts are due under the contract from the defendants to the complainants. Likewise it is essential to the protection of complainants' rights under the contract that the integrity of the books and records of defendants should be preserved in tact for use in an accounting hereafter to be had between the parties through the injunctive power of a court of equity.

found a full discussion of this question under the
discussion regarding Federal and State Jurisdiction
and already pointed out. In this case Mr. Justice
Toll said: "It is a question of law and not of fact."

patented for invention under a license or assignment
granted by him, or for any remedy in respect of a non-
infringement use of the patent is not a valid under
the patent laws of the United States, and can not be
maintained in a Federal court as such." (Quoting case).

We think from the arguments of the bill, which
are not challenged, that a clear case is shown for equity
jurisdiction and relief by way of injunction as prayed.

The statements are charged with manufacturing the patented
product without any right so to do and in violation of

the property rights of the complainant Bill & Company
Company, who have the exclusive right granted to it by the

patent to manufacture the product. The refusal of the

defendants to permit access to their books of account reflect-

ing the sale, as well as the manufacture of the product, is

showing a cause for the intervention of a court of equity.

The conditions set forth in the bill would make it necessary

for an accounting between the parties to determine what

amounts are due under the contract from the defendants to the

complainants. Likewise it is essential to the protection

of complainants' rights under the contract that the integrity

of the books and records of defendants should be preserved

in view of the fact that an accounting hereafter to be had between

the parties through the injunctive power of a court of equity.

It is apparent from the attitude of defendants, averred in the bill, in failing to pay the amounts claimed due by complainants, and by reason of defendants' denial to complainants of their right under the contract to verify, by the defendants' books, the amount of the manufacture and sales made by them of the heaters, resort to equity is made necessary to ascertain, by an examination of such books of account, the amount rightfully due from defendants to complainants under the contract between them.

Whenever the case is before us on the merits, we will determine all of the questions which may then be presented, but at the present time we are of the opinion that the bill states facts sufficient to give a court of equity jurisdiction to grant the temporary injunctional relief sought and granted by the order of July 6, 1927, involved in this appeal.

For the foregoing reasons the interlocutory order of the Superior Court appealed from is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

It is apparent from the attitude of defendant, reverts in the bill, in failing to pay the amounts claimed due by complainant, and by reason of defendant's refusal to compliance of their bill under the contract so verified, by the defendant's books, the amount of the sum-plaintiff and relief made in favor of the plaintiff, which is made necessary in plaintiff, by an accounting of such books of account, the amount rightly due from defendant as complainant under the contract between them.

Whereas the case is before us on the merits, we will determine all the questions which may arise in the present case we are of the opinion that the bill states facts sufficient to give a court of equity jurisdiction to grant the temporary injunctive relief sought and granted by the order of July 6, 1907, involved in this appeal.

The following reasons are respectfully order of the Superior Court appealed from is affirmed.

ATTEST.

TAYLOR, J. J. AND WILSON, J. CLERKS.

JOSEPH DAMATO, a minor, by
Andrew Damato, his father and
next friend,

Appellee,

v.

CONSUMERS COMPANY, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed November 9, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

This was an appeal by the defendant from a judgment of the Superior Court of Cook County, affirming a verdict in favor of plaintiff below for the sum of \$6,500.00 May 31, 1919. Said cause was reversed by this court, and in the opinion rendered in said cause on said date, it was held that the verdict was against the manifest weight of the evidence, and it was ordered that the judgment of the Superior Court of Cook County be reversed with a finding of fact. It was accordingly found, in accordance with said opinion, that the ultimate fact was that the plaintiff was injured near the southwest corner of 47th and Federal streets, in the City of Chicago, and that the defendant in the operation of its truck was guilty of no negligence. A writ of error was sued out in the Supreme Court, and on the 22nd day of October, A. D. 1927, that court reversed the judgment of this court, with directions that it either affirm the judgment of the Superior Court or reverse it and remand the cause for a new trial. This cause now being before this court on a motion of Joseph Damato, by Andrew Damato, his father and next friend, plaintiff below, to affirm the judgment

of the Superior Court, in accordance with the judgment of the Supreme Court, hereinbefore filed in this court, it is ordered that the motion be and the same is denied. It is further ordered that the judgment of the Superior Court be and the same is hereby reversed, in accordance with the mandate of the Supreme Court, and the cause is remanded to that court, with directions for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

TAYLOR, P.J. AND HOLBOM, J. CONCUR.

of the court, in accordance with the judgment
of the court, hereinafter filed in this court,
it is ordered that the action be and the same is denied.
It is further ordered that the judgment of the Superior
Court be and the same is hereby reversed, in accordance
with the mandate of the Supreme Court, and the cause is
remanded to that court with directions for a new trial.
IN WITNESS WHEREOF, I have hereunto set my hand and
the seal of the court, at the City of New York, this
first day of January, A.D. 1901.

JOSEPH P. KELLY, J. CLERK

MRS. FRANCES RYAN,

Appellee,

v.

R. V. FONGER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed November 9, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment in a forcible entry and detainer case, which judgment was in favor of plaintiff below, finding that plaintiff have and recover from the defendant possession of the premises described in the complaint, known as the second apartment at 5540 Kenmore Avenue, Chicago, Illinois, and that a writ of restitution issue.

It appears from the facts that on December 16, 1926, about 10 o'clock in the morning, one Haven, agent for the plaintiff, posted a five day notice on the door of defendant's apartment; that prior to the posting of said notice, the witness rang the bell and knocked on the door; that nobody responded and he could not see nor hear anybody on the premises. The five day notice was signed properly, and in connection with said notice an affidavit of Haven's was filed, stating that he had posted the notice - no one being in actual possession of the premises.

It is argued here by the defendant below that the court did not have jurisdiction and consequently the judg-

ABSTRACT = FREE

JUNE 1969, 1969

Ver. 2.1.0

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Original filed November 9 1957.

See <http://www.elsevier.com/locate/jmbs>.

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There is no need for a legend in a figure.

The report of the President's Council on the Environment, dated 1970, states:

January 1961 and 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642,

from the following information of the previous paragraph:

In the complaint, known as the second operation of 1942

Wentworth Avenue, (Boston), Illinois, 60604, to give a test run.

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

It is hereby certified that the above is a true and correct copy of the original as the same appears in the records of the Department of the Interior.

Subject to change in the morning, one would expect for the

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

...prior to the meeting of said board, the

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reproduced and be sold for any purpose or for advertising.

The five key notes were: "highly profitable," "an excellent investment," "a good buy," "a good investment," and "a good buy."

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 09-18-2010 BY 60322 UCBAW

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• 1944-1945 •

It is argued here by the defendant below that the

It did not have jurisdiction and consequently the judge

ment is void. The defendant Fonger, testifying in his own behalf, stated that at the time in question he was in actual possession of the premises and was living there with his wife and family; that he was not there at the time of the posting of the notice, but that upon his return the same day, the notice was handed to him by his mother-in-law, who lived with him. He further attempted to justify on the merits of the cause, by showing that the plaintiff below had promised that if he paid the rent she would see that certain repairs were made on the premises.

The Forcible Entry and Detainer Act provides that service may be made by delivering a copy of the notice to the tenant or by leaving a copy with some person above the age of 12 years, residing on or in possession of said premises; or in case no one is in actual possession of the premises, then by posting the same on the premises.

The evidence shows that as a matter of fact either no one was in the premises at the time of the posting of the notice on the door, or if they were there, they were avoiding service. It is further shown by the facts that defendant below actually came into possession of the notice.

The attempted defense to the merits was insufficient in law. It did, however, serve to waive the question of the validity of the notice. The parties were in court on a motion to quash the summons. This motion being overruled, defendant below failed to stand by his motion, and proceeded to introduce testimony as to the merits, and for

was in vain. The defendant, however, testifying in his own
defense, stated that at the time in question he was in actual
possession of the premises and was living there with his
wife and family; that he was not there at the time of the
posting of the notice, but that soon after the return of the
day, the notice was handed to him by his mother-in-law,
and that he, the defendant, attempted to justify as
the parties to the matter, by stating that the plaintiff
below had promised that if he paid the rent she would see
that certain repairs were made on the premises.

The plaintiff, Emily and defendant, John, provided
that notice was made by delivering a copy of the
notice to the tenant or by leaving a copy with some person
above the age of 18 years, residing on or in possession of
said premises; or in case no one is in actual possession
of the premises, then by posting the same on the premises.

The evidence shows that as a matter of fact
either no one was in the premises at the time of the
posting of the notice on the door, or if they were there,
they were avoiding notice. It is further shown by the
facts that defendant below actually came into possession
of the notice.

The suggested defense to the action was invalid-
ent in law, is old, however, never to raise the question
of the validity of the notice. The parties were in court
on a motion to quash the return. This motion being over-
ruled, defendant below failed to stand by his motion, and
proceeded to introduce testimony as to the notice, and the

this reason we are of the opinion that he waived any irregularities in regard to the same.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLCOMB, J. CONCUR.

With regard to the question of the validity of the contract, it is to be noted that the contract was made by the parties in the presence of witnesses, and that the parties have acted upon it for some time.

For the reasons stated in this opinion, the

judgment of the court is affirmed.

RECORDED & INDEXED

JOHN A. HARRIS, CLERK

382 - 31814

MARGUERITE COLE,
Appellee,
v.
BALTIMORE & OHIO RAILROAD
COMPANY,
Appellant.

6254
246 I.A. 615³
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$7,000 against the Baltimore & Ohio Railroad Company for damages for injuries alleged to have been sustained by plaintiff while a passenger on one of its trains.

The grounds alleged for reversal are that the verdict is against the manifest weight of the evidence, the judgment is excessive, and the court erred in giving an instruction requested by plaintiff.

The train in question on which plaintiff was a passenger was wrecked in the afternoon of November 15, 1925, after leaving Baltimore, Md., for Chicago. It was running at the time about forty to fifty miles an hour. The engine and mail car next behind it were thrown onto their sides and the engine plowed along about a car length after turning over. The trucks of the Pullman car in which plaintiff was riding were derailed and the car was slightly tilted. She was lying in her seat on the left-hand side of the car facing the engine with her head toward the aisle. No other persons were in the car except Hatch, the Pullman conductor, Alston, the Pullman porter, and one Cora Gallagher, a passenger.

As to the facts, only what happened to plaintiff at the time of the accident and the results thereof are in controversy.

TABLE 2. (continued)

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There is no record of any other person who was arrested on the same date as the person named in the above captioned document. The person named in the above captioned document was arrested on the same date as the person named in the above captioned document.

...and the ...

of knowledge and experience and to receive testimony and evidence in
reference to the same in order to be able to give evidence in the
trial of the case.

[illegible]

and several other factors, including the following:

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[illegible]

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...and the ...

In the history of American literature, the novel has been a dominant form of fiction, and the American novel has been a dominant form of the novel. The American novel has been a dominant form of the novel, and the American novel has been a dominant form of the novel.

Plaintiff testified that she was asleep and thrown to the floor of the car; that the first thing she knew was suffering intense pain and being pulled to the seat by a woman; that she was somewhat dazed and managed to get off the train and walk a little ways, and returned in about two minutes to the car, and while suffering great pain became hysterical; that she was taken to another car in the train and placed in a berth where she had an uneasy night and was cared for by a Pullman car maid; that she continued on the train to Chicago, and placed herself under the care of a physician, chiefly Dr. Vallialy, who has been attending her since; that X-rays were taken of her spine; that an operation was suggested but advised against for at least six months; that she remained in bed for about two weeks, and has suffered great pains in her spine, especially the extremity, and has been and is unable to sit in a normal posture without much pain there, and was compelled to and did abstain from work for some time, and has since worked intermittently or part time as her condition would permit.

The other persons in the car testified for defendant, all to the effect that plaintiff was sleeping at the time of and through the accident, and did not fall to the floor of the car. Cora Gallagher testified that some considerable time after the accident she awakened plaintiff by shaking her "slightly," and reproved plaintiff for apparent levity over the situation. She seemed to have evinced a marked dislike for plaintiff.

The Pullman maid testified that she gave plaintiff attention after she was removed to the other car until about midnight, and on going to her berth found her lying on her back, asleep, at 1 o'clock, and again at 5 o'clock. One Clifton, a passenger, testified that he came into the car about three minutes after the derailment, heard Miss Gallagher "giving Miss Cole a

[illegible][illegible]

The witness had testified that the two children
arrived at the house and remained in the room until about
midnight, and he could not recall the exact time they
left, as it was dark, and again he testified that
he could not recall the exact time they left the house
and did not recall the exact time they left the house.

call down," and remembered her saying: "There is nothing to laugh at," and that plaintiff was then lying down with her head toward the aisle; and later he saw her walking around outside inspecting the wreck, apparently like an ordinary person; that about a half hour later saw her in hysterics, and heard her complaining of a pain in her back.

It is conceded that the preponderance of the evidence is not determined merely by the number of witnesses, and that this court will not reverse on the weight of the evidence unless the verdict is manifestly against it.

As to what happened at the time of the derailment, we think the jury may well have questioned, on consideration of the surrounding circumstances and the probability of the truth of the several statements, whether a person (who, according to Miss Gallagher, was readily awakened a few minutes after the derailment by being "shaken slightly") would not have been awakened and thrown from her seat by the jar of the derailment and the sudden stopping of a train going forty or fifty miles an hour, and whether under such circumstances her fall would not have a tendency to produce the injuries of which she complained. It is apparent from the character of the evidence that the verdict depended much upon the jury's view of its credibility; and, as frequently said, they had a better opportunity for determining its credibility than we have, and they may well have rejected some of the evidence of defendant's witnesses above referred to as inherently unlikely or improbable.

The testimony is also sharply conflicting as to plaintiff's injuries. Dr. Vallsly, who was called by her shortly after her arrival in Chicago, testified that he found her in great pain and suffering, and on account thereof was unable to make a thorough

physical examination at that time; that she complained of pain down her spine and particularly at the lower end thereof, and of having terrible pain when she moved, and not being able to sleep. He found two black and blue spots on her left buttock. X-ray pictures were taken of her spine and introduced in evidence. Dr. Brock, who took some of them, and Dr. Vallely both claimed there was a fracture of the coccyx and displacement, and it was the opinion of the latter, in answer to a hypothetical question, that the accident was sufficient to bring about the injury complained of, and that the condition is a permanent one. Plaintiff still complains of pain in her whole spine, of inability to lie on her back or to sit in an ordinary posture on a chair without pain, or to indulge, as formerly, in sports and the exercise of dancing, horseback riding and boat rowing, and that the pain is weakening and produces nausea. None of this evidence as to her condition since and before the accident is controverted except upon medical theory.

It was admitted by plaintiff's physicians that in a few normal cases there are deflections of the coccyx to the right or left. Dr. Cushman testifying for defendant with regard to the deflection as shown by the picture said that such deflections are very common where there are no symptoms or history of any trouble in that region, and that he had found as a result of his examinations that less than forty per cent of the coccyges that he has examined are absolutely straight, and many in normal cases deflected as much as shown by the X-ray pictures. Dr. Frestler testified to substantially the same effect.

Other physicians called by defendant testified, in answer to a hypothetical question, that a person could not sustain a fracture or dislocation of the coccyx by a fall to the floor for

the reason that the coccyx is so thoroughly protected by bone and tissue.

Nevertheless that plaintiff's health and physical condition underwent a decided change immediately after the accident, and that such accident was the cause of the change can hardly be questioned. To urge any other conclusion would require a jury to believe that plaintiff was malingering. They did not, and from the testimony could not, take such a view of the case, and we are not disposed to hold that the verdict is not supported by a preponderance of evidence either as to the circumstances of the accident or the character of the injuries resulting therefrom. And whatever be the correct medical theory, if as the result of such accident she has suffered to the extent complained of, we cannot conclude that the judgment is excessive.

Complaint is made of an instruction given at plaintiff's request as to what matters may be taken into consideration in determining plaintiff's damages, among them, "such sum or sums as plaintiff has become liable for, if any, for medical service because of such injury * * * and her expenditures for medical services, if any." It is urged that there was no evidence that plaintiff had become liable for any medical services; that the only testimony bearing on the subject is that of Dr. Vallyely who testified that the fair, reasonable and customary charge for the services he rendered would be \$250, but that he did not say he had charged appellee anything or rendered a bill or intended to do so. It is further urged against the instruction that plaintiff testified that she had paid all of her doctors except Dr. Vallyely, but did not name the amounts.

It should first be noted that contrary to the contention of counsel for appellant, and as shown by the instruction set

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have been in the country for some time is that the change is so

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forth in their own brief, each of the clauses referred to is followed by the words, "if any." It cannot be inferred, therefore, that the jury included in their verdict expenditures for medical services that were not proven. And they had a right to include Dr. Vallisly's charges, as the testimony warranted the conclusion of plaintiff's liability therefor, from the fact that she having called him became liable for the value of the services rendered. In a similar case it was held that such testimony was sufficient on which to base a similar instruction. (McCarthy v. Spring Valley Coal Co., 186 Ill. 185, 188.)

The judgment is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

with in their own mind, each of the children referred to in
the evidence of the case, "I say, "I cannot be satisfied, because
that, that they believed in their minds a possibility for
medical evidence that were not proven. And they had a right to
include Dr. Telling's opinion, as the testimony contained the
conclusion of Telling's ability to believe, then the fact that
the doctor said the woman had a right to the value of the evidence
presented. In a similar case it was held that such testimony was
admissible in which to have a similar testimony. (HARRIS v.

HARRIS v. HARRIS, 100 Ill. App. 2d, 195.)

The judgment is affirmed.

REVEREND

Witness my hand and seal, this 10th day of

18 - 31894

GLADYS McROSE,
Defendant in Error,

v.

HUGO REX McROSE,
Plaintiff in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. RESIDING JUDGE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from the issuance of an attachment writ requiring the defendant in a divorce suit to appear and show cause why he should not be punished for contempt of court in neglecting and refusing to comply with an order to pay temporary alimony. Defendant alleged both in his answer to the bill and in his answer to the rule to show cause that complainant was not a resident of Cook county prior to and at the time of the filing of the bill, and called attention to the fact that she did not allege in her bill that she is a resident of said county.

It is stated by plaintiff in error's counsel that the court held that it did not matter what county the complainant resided in so long as the acts of cruelty relied on were alleged to be committed in the county where the bill was filed. While the record does not disclose the grounds of the court's ruling, if correctly stated it was directly contrary to the decision of the Supreme court in Hay v. Hay, 64 Ill. 406, 410. The court there construed the statute on that point as requiring actual residence of the complainant in the county where the bill is filed, and held that such residence is a condition precedent to the jurisdiction of the court. It was also said there that when the

want of jurisdiction clearly appears during the progress of the trial it is the right and duty of the court to dismiss the bill. Jurisdiction cannot be waived and questions of jurisdiction over the subject matter of the suit may be raised at any time, and for the first time, even on appeal. (Becklenberg v. Becklenberg, 232 Ill. 120.)

Attention having been called to the court that an essential element of jurisdiction was lacking, not only in the bill but in fact, it should have dismissed the bill unless it was properly amended. Until all the elements of jurisdiction appeared the court had no authority to enter the order in question. Accordingly it is reversed.

REVERSED.

Gridley and Scanlan, JJ., concur.

and of legislation already enacted during the progress of the
 trial it is the right and duty of the court to consider the bill.
 The committee cannot be asked and compelled to legislate upon
 the subject matter of the bill any more than it can be asked to
 legislate upon the bill. (The committee is not a legislative body.)

Legislation having been asked of the court and in
 answering claims of jurisdiction was refused, now only in the
 bill has the court. It should have declined the bill unless it
 was properly presented. (The bill is the subject of jurisdiction.)
 The court has no right to legislate in order to legislate.
 Inasmuch as it is a court.

Legislation and jurisdiction, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

64 - 31689

CLARA MATERS,
Defendant in Error.

v.

ELIZA J. JENKINSON,
Plaintiff in Error.) BRANCH TO SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This writ seeks review of a decree which finds that defendant must account for and pay complainant all money, and the value of securities and property which came into her hands or possession from complainant, with interest at the rate of 8 per cent per annum, amounting at the date of the decree to \$9,761.71, and that complainant has an equitable lien for said sum in the nature of a mortgage upon real estate described in the bill and acquired with complainant's money, and orders satisfaction of the sum from the proceeds of the sale of said real estate at public auction in case the debt is not paid.

It appears from the record that on the general call of the docket had July 9, 1923, an order was entered striking the cause from the several dockets of the court pursuant to the terms of a general order spread of record June 5, 1923, which provided that a case so stricken might be reentered after September 17, 1923, and prior to January 1, 1924, on a proper showing. The case was reentered to the docket by an order entered June 29, 1925.

The only point made in plaintiff in error's brief is that the court had no jurisdiction to reinstate the case on the latter date. None of the authorities cited supports the proposition. All are cases where there was an order of dismissal.

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1918 - 1919

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

LAND OFFICE
WASHINGTON, D. C.
JULY 1, 1918

ORDER OF THE SECRETARY OF THE INTERIOR
RE: THE LANDS OF THE UNITED STATES

THIS OFFICE has received a request from the
Department of the Interior for the purpose of
the sale of certain lands of the United States
which are situated in the State of California.
The lands are situated in the County of Santa
Barbara, and are more or less situated in the
State of California. The lands are situated in the
County of Santa Barbara, and are more or less
situated in the State of California. The lands
are situated in the County of Santa Barbara, and
are more or less situated in the State of California.
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Barbara, and are more or less situated in the
State of California. The lands are situated in the
County of Santa Barbara, and are more or less
situated in the State of California. The lands
are situated in the County of Santa Barbara, and
are more or less situated in the State of California.

It appears from the report that the lands of the
United States are situated in the State of California.
The lands are situated in the County of Santa
Barbara, and are more or less situated in the
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State of California. The lands are situated in the
County of Santa Barbara, and are more or less
situated in the State of California. The lands
are situated in the County of Santa Barbara, and
are more or less situated in the State of California.

Contrary to plaintiff in error's contention that the term "stricken from docket" is synonymous with "dismissed for want of prosecution," it was said in Frederick v. Connecticut River Savings Bank et al., 106 Ill. 147, that striking the case from the docket is not the equivalent of dismissing the bill for want of equity. We think this is obvious. Striking the case from the docket does not, like dismissal, end its existence. The case is still alive and subject to reinsertion on the docket. While the application to reinstate the present case on the docket was not made within the time stated in the general order of court for entertaining such an application, such order did not purport to dismiss causes not reinstated within that time nor have the effect to end the jurisdiction of the court to reinstate upon a proper showing at a later date. It might be regarded as imposing diligence in appealing to an exercise of the court's discretion after the time fixed in the order, but does not deprive it of its jurisdiction.

Relying upon said point plaintiff in error's ^{counsel} deemed it unnecessary, as stated in his brief, to discuss the merits of the case, and, not having done so, any question in regard thereto is, under the rules, waived. While he does, contrary to the rules, discuss them to some extent in the reply brief and, contrary to the rules, without referring to a single page of the abstract of 109 pages or to the record of over 800 pages, this court would not under such circumstances undertake the task of examining either the abstract or the record in detail to determine the merits of the case. We may assume, therefore, that there was sufficient proof to justify the decree, and accordingly the same is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

[illegible]

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81 - 31689

GRAYSON S. ABBOTT,
Appellant,

v.

THE EVENING AMERICAN
PUBLISHING COMPANY,
a corporation,
Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action for libel. The appeal is from a judgment for costs against plaintiff upon a verdict directed by the court to find defendant not guilty.

The declaration consists of four counts to which was pleaded the general issue. The first count was withdrawn at the close of plaintiff's case. Before instructing the jury to render a verdict finding the defendant not guilty the other three counts of the declaration were on defendant's motion dismissed. As the effect of granting such motion was to eliminate all issues presented by the pleadings and therefore left no question of fact for submission to the jury or for adjudication, it was error to instruct a verdict. If the court was correct in holding that after the withdrawal of the first count the pleadings presented no cause of action, then the suit was subject to dismissal as presenting nothing for adjudication. Appellant assigns as error the refusal of the court to allow her to amend at this stage of the proceedings before instructing the jury. While the assignment is not argued, we think the amendment asked for should have been allowed, it stating as a cause of action nothing not contained in the withdrawn count. The only two points appellant argues are (1) whether after striking the first count the other three

[illegible]

THE UNIVERSITY OF CHICAGO

Journal of Interpersonal Violence 28(12)

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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with similar information as other individuals who to whom such information is now being furnished under the Freedom of Information Act.

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Source: New York and N. J. Division of Criminal Justice, New York City

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There is a small amount of information in the file which is not in the file.

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There are no other persons named in the will.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States.

counts by the reference therein made to the first count stand as a complete statement of a cause of action, and (2) whether it was necessary for plaintiff to prove that some one other than herself read the alleged libel.

The first count after setting forth the venue, title of the court, names of the parties and form of action, states as extrinsic facts of inducement that (1) she was a person of good name, etc.; and (2) that in 1918 she had intermarried with one Robert E. Abbott, and was divorced from him in December, 1922, and that she has been and is now known by the name of Mrs. Robert E. Abbott as well as by the name of Grayce S. Abbott. Then after stating certain facts applicable to the first count, it avers "yet the defendant well knowing the premises but contriving and wickedly and maliciously intending to injure the plaintiff and to bring her into public scandal and disgrace on to-wit: December 12, 1923, in the county aforesaid, wickedly and maliciously did compose and publish and cause to be composed and published of and concerning the plaintiff in a certain newspaper called The Chicago Evening American, whereof the defendant was then and there the editor and proprietor, a certain false, scandalous, malicious and defamatory libel containing among other things the false, scandalous, malicious, defamatory and libelous matters following of and concerning the plaintiff," and then is set forth the libelous matter in seven paragraphs.

Omitting the formal introductory matter as to venue, title of the court, names of the parties and form of the action recited in the first count and the extrinsic facts above enumerated as numbered, each of the three remaining counts begins "And the defendant further contriving and intending, as aforesaid, afterwards, to-wit, on the 12th day of December, 1923, in the county aforesaid, did publish and cause to be published," etc., and then follows the alleged

by the statement therein made as to the facts about the
 a receipt of a sum of money, and (2) whether it was
 necessary for plaintiff to prove that such sum was actually
 paid to the defendant.

The first count of the complaint is in substance as
 follows: That the defendant, on or about the 1st day of
 January, 1911, did unlawfully and wrongfully take from
 the plaintiff a sum of money to wit: \$100.00, and that the
 defendant has refused to return the same to the plaintiff
 and that the plaintiff is entitled to recover the same.

The second count of the complaint is in substance as
 follows: That the defendant, on or about the 1st day of
 January, 1911, did unlawfully and wrongfully take from
 the plaintiff a sum of money to wit: \$100.00, and that the
 defendant has refused to return the same to the plaintiff
 and that the plaintiff is entitled to recover the same.
 The third count of the complaint is in substance as
 follows: That the defendant, on or about the 1st day of
 January, 1911, did unlawfully and wrongfully take from
 the plaintiff a sum of money to wit: \$100.00, and that the
 defendant has refused to return the same to the plaintiff
 and that the plaintiff is entitled to recover the same.
 The fourth count of the complaint is in substance as
 follows: That the defendant, on or about the 1st day of
 January, 1911, did unlawfully and wrongfully take from
 the plaintiff a sum of money to wit: \$100.00, and that the
 defendant has refused to return the same to the plaintiff
 and that the plaintiff is entitled to recover the same.

The fifth count of the complaint is in substance as
 follows: That the defendant, on or about the 1st day of
 January, 1911, did unlawfully and wrongfully take from
 the plaintiff a sum of money to wit: \$100.00, and that the
 defendant has refused to return the same to the plaintiff
 and that the plaintiff is entitled to recover the same.
 The sixth count of the complaint is in substance as
 follows: That the defendant, on or about the 1st day of
 January, 1911, did unlawfully and wrongfully take from
 the plaintiff a sum of money to wit: \$100.00, and that the
 defendant has refused to return the same to the plaintiff
 and that the plaintiff is entitled to recover the same.

libelous matter, or some part thereof, as set forth in the first count, concluding with the averment that the defendant intended thereby to charge plaintiff with having attempted suicide by means of taking poison.

It is conceded that where a special reference is made to one count to a specific allegation contained in another, the striking or withdrawing of the count does not remove it from the record so that reference can not be made to it. But invoking the general principle of pleading that a count which is insufficient can not be aided by averments in other counts except where the reference is clear and explicit (31 Cyc. 123, 124) it is urged by appellee that the words "And the defendant further contriving and intending as aforesaid" referred only to the intention of the defendant. Even if this were conceded it would merely eliminate the above extrinsic matters of inducement and not the other formal matters of venue, title, names of parties and form of action. But the only material matter so set forth as inducement to connect plaintiff in the colloquium, is the averment of her identity as Mrs. Robert E. Abbott, concerning whom the alleged libelous matter was published. This averment, however, is repeated in the third count by averments that plaintiff was known by that name, and that in connection and as a part of the said matter published by defendant of and concerning plaintiff, defendant published a picture and portrait of plaintiff. Said count therefore sufficiently stated a cause of action, and whether the other remaining counts did or did not, it was error to dismiss the third count, supported as it was by adequate proof.

Appellee urges that there was no proof that the alleged libelous article was read by a third person. Such proof was not necessary to show publication or circulation after it was admitted by counsel for defendant that the alleged published matter set up in the declaration was printed in an early morning edition of

The Chicago Evening American and that the circulation of that edition was about 20,000 copies. It was held in Sproul v. Pillsbury, 72 Me. 20, that in charging a newspaper with publication of a libel it was not necessary to aver that it was published "to divers and sundry persons or to any third person;" that "to publish is to make public," but "the degree of notoriety given to the publication is a matter of proof." The degree of notoriety there shown and here admitted was a circulation of about 20,000 copies of the newspaper.

It is urged, too, by appellee, that as there is no claim that the publication of the picture itself of plaintiff was libelous, and it was stipulated between counsel that the libel did not refer to the plaintiff, there was no issue for the jury to decide. The so-called stipulation consists of opening remarks of counsel for defendant to the jury, to portions of which he said counsel for plaintiff had agreed. As we read the record plaintiff's counsel did not assent to the sole defense that the libel did not refer to plaintiff, but merely to the fact that there was another Mrs. Robert E. Abbott of whom the publication was a true account. Such admission, however, had no tendency to negative the fact that the published article in connection with the picture of plaintiff purported to state the alleged facts concerning her.

For the errors stated the judgment will be reversed and the cause remanded for a new trial with directions to allow the amendment asked for and to vacate the order dismissing the third count.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

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PETER F. REYNOLDS,
Appellee,

v.

LEANDER J. IBOLD,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$2,934.33 in favor of plaintiff entered on the verdict of a jury.

The declaration was upon a promissory note and the common counts. There was a plea of payment of the note, and of all money alleged to be due.

The promissory note was for \$2,000, with interest at six per cent per annum, payable to defendant's own order one year after its date, January 2, 1919. It was signed and endorsed by him and delivered to plaintiff on that date. Prior thereto they had been associated in business in Chicago. Defendant left plaintiff's office in January or February of that year and established himself elsewhere in the city. They met occasionally until July of that year when plaintiff went abroad, returning the last of December. Sometime in April, 1919, plaintiff took the note from the vault in his office to a bank for discount. Failing to effect that purpose he returned the note, so he thinks, to said vault, but has no distinct recollection of it and admits he might have lost it. He missed it during that month. Having no other name thereon than defendant's it bore no indication of its ownership.

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THE UNITED STATES

DEPARTMENT OF THE INTERIOR

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way into defendant's possession he immediately after missing it sent a party to defendant upon the pretext that said party had the note for sale or discount, but really to ascertain whether defendant knew the note had been lost. Thinking defendant might in some way have obtained access to the vault and evidently still distrusting him, he met defendant on April 29 and informed him that he had the note and asked defendant to buy it. Defendant admits that plaintiff then told him that he would not dispose of the note without first conferring with him.

At the trial complainant produced a carbon copy of a letter sent defendant May 9, 1919, in which he referred to said conversation, and the fact there are persons in the business of buying negotiable paper, and reassured him that plaintiff would not dispose of the note without conferring with him. Defendant claims he never received that letter, but there is a circumstance tending to support plaintiff's contention that he wrote and mailed it, for before he knew that defendant claimed to have paid the note he wrote another letter reiterating said promise not to dispose of the note without conferring with defendant, and in the letter referred to his letter of May 9.

Defendant claimed that one Edwards, whom he never saw or heard of before or since, on November 4, 1918, called him over the telephone concerning the note and arranged to meet him at the First National Bank of Chicago. Each was to identify the other by a description of his clothing as given over the telephone. According to defendant's testimony they met there and without any other inquiry of the stranger as to where he got the note, or the identity of the person from whom he got it, except his name was "Johnson," and without any effort to establish Edwards' address,

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and a party in telephone room the night that will party and
and with the wife of telephone, but likely to remember the
telephone room the wife had been late. Nothing remembered

which is what very much occurred around in the night and telephone
it will also explain that he was telephone on April 27 and in-
formed him that he had the wife and called telephone to her in
telephone room the wife had been late. Nothing remembered
telephone of the wife which first conversation with him.

On the first conversation received a return copy of a
letter was telephone May 2, 1934. In which he referred to wife
conversation, and the fact there was person in the telephone of
having telephone paper, and telephone him that telephone woman
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business or connections by which he might afterwards be found, he took Edwards to his own bank where he claims to have written out a check for \$2,000. The check marked "Paid November 4, 1929" was produced by defendant in court on notice given by plaintiff.

Defendant's own evidence presented many additional suspicious circumstances bearing on his good faith and the genuineness of the alleged payment. The check was filled out in his own handwriting with the exception of the date thereof placed thereon by a rubber stamp. When asked to explain how that happened he said he possibly borrowed it "from the cashier or paying teller." When pressed to explain the unusual, if not improbable, circumstance, he said he may have stamped it at his office. He said he had torn the check from the back of his check book which he left at his office. As it bore a serial number plaintiff called for the check book. He could not produce it. The check was certified, as he said, at Edwards' request. But as it was then and there cashed he claimed that Edwards changed his mind and procured the cash on his identification. His deposit slips having been called for they showed that on the 5th, 6th and 10th days of that month, respectively, he deposited to his account in currency \$800, \$500 and \$1000, the precise aggregate amount of the check. While he made only one other deposit of cash during November and December, and that for only \$75, he was asked to explain these large deposits. He claimed they were for rent. But another deposit slip contained items from \$58 to \$96.50 he had received for rent. He failed to show for whom he collected rent in such large sums as appeared in said three deposits.

To give the appearance of verity to his claim of payment to Edwards defendant had an advertisement for his whereabouts put in a newspaper. But a business man like him could hardly have been

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

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oblivious to the fact that the circumstances under which he claimed to have dealt with this mysterious stranger obviously tended to show a fictitious transaction. His incredible explanation of payment rendered it unnecessary to account for how the note came into his hands. If presented by a stranger, as he contends, it is singular, in view of his relationship with plaintiff and the latter's promise not to negotiate the note, that he took no pains to learn from plaintiff whether it had been negotiated, or to identify the stranger whom he met under such suspicious circumstances. After a review of the evidence we think there can be no question about its preponderance in plaintiff's favor.

The general principles of law stated in appellant's brief are not questioned, but there is little room for their application. Appellant makes no pretense of following his brief in his argument as required by the rules. Under them his points might be deemed waived, but we shall consider them.

The first is that there should have been a directed verdict because there was no count on a "lost" note. But the note was not lost. It was admittedly in defendant's possession and so known to be by plaintiff before the suit was brought. There was, therefore, no occasion for a bond of indemnity as a condition precedent to a right of action as provided by section 14, chapter 98 of the Negotiable Instrument Act. (38 C. J. 248.)

It is also urged that the note was not received in evidence. Even if so, there was ample proof of the amount due to support the common counts (Nouff v. Scholes, 126 Ill. 394), and a judgment thereon was warranted under the proof even if the note was lost. (O'Hail v. O'Hail, 128 Ill. 361.) Plaintiff, however, offered the note in evidence before closing his case and the court reserved its ruling. Afterward the defendant identified the note

Witnesses for the fact that the respondents were under no obligation to have been with him at the time of the alleged assault.

That a physical examination of the respondents was necessary to determine if there was any evidence of a sexual assault. It is noted that the respondents were not examined by a physician, as the respondents, at the time of the alleged assault, were not in a position to be examined.

It is noted that the respondents were not in a position to be examined at the time of the alleged assault. It is noted that the respondents were not in a position to be examined at the time of the alleged assault.

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The general principle of the law is that the respondents were not in a position to be examined at the time of the alleged assault.

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and plaintiff again offered it, and the record shows that defendant's attorney recognized it as received in evidence. While the procedure was irregular it was harmless.

It is also urged that a carbon copy of the letter of May 9, was received in evidence without proof that the original bore a postage stamp. Plaintiff testified to having mailed the letter. In view of all the evidence with regard thereto its materiality may have been questioned on other grounds. Only a general objection was offered to its introduction. We think the point should have been specially raised, and it cannot be raised here for the first time.

The court received in evidence a sketch of plaintiff's office arrangements in connection with proof of the situation therein and the relationship of the parties after the note was delivered and before defendant left the office, and in connection with testimony that defendant had access to the vault while there and had visited the office as late as June of that year. We think it was relevant, whatever ^{weight} might be attributed to it by the jury. After its admission plaintiff's counsel remarked, "I am going to show he had access to the note sued on." The court then remarked, "That is shown." Unquestionably the remark was error, but we cannot regard it as harmful. The case evidently turned on the absurdity and improbability of defendant's claim of payment rather than the prima facie case relied on by plaintiff before the defense was introduced. But for the defense, which the jury manifestly rejected as absurd and improbable, regardless of how defendant obtained possession of the note, the error might be serious. It was immaterial how defendant got possession of the note if, as a matter of fact, he never paid it and was unable to establish a bona fide negotiation of it. In this view of the case we think

the error was harmless.

Complaint is made of the refusal of instructions offered by defendant, and of two given at the request of plaintiff. As to one of the latter, appellant's counsel merely asserts that it does not state the law, without showing why. As to the other, he contends there is no evidence upon which to base it. In that we do not agree with him. As to the refused instruction counsel merely asserts it is his belief that the court erred, but without arguing the matter. Under our rules we cannot be required to search out possible errors in instructions that are not pointed out. We do not think counsel has indicated any reversible error.

Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

Journal of Management Education 26(7) 809-821

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• *It would be difficult to compare the results of the study to other studies.*

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• **2008** – **100th Anniversary of the Russian Revolution**

WILLIAM THAYER, for use of
WILLIAM S. FRASER, Jr.,
administrator, etc.,
Appellant,

v.

AL V. BOOTH, garnishee.

HELEN M. THAYER,
intervening claimant,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a garnishee proceeding. The sole issue presented is one between the garnisher and an intervening claimant, a daughter of the judgment debtor, William Thayer, the nominal plaintiff herein.

The judgment against said William Thayer, on which the proceeding is based, was for \$5,500 and recovered April 9, 1920. The execution thereon was issued July 12, 1920, and returned "no property found" October 11, 1920. He was then and up to the time of the sale and transfer of his membership, June 1, 1926, a member of the Chicago Board of Trade. As a result of said sale there was in the hands of the garnishee Booth, the broker negotiating the same, at the time of the service of summons, which was on the day of the sale, a net amount of \$6,530.35, to which the intervening claimant lays claim by virtue of the following instrument executed by said William Thayer and delivered to her December 2, 1920:

"Chicago, Dec. 1, 1920.

To Helen M. Thayer

I hereby acknowledge receipt of One Thousand Dollars from you and it is hereby further understood that you are to turn over to me from your weekly wages the sum of fifteen (15.00) per week so long as you remain at home. That for services in and about the home and money advanced to me from

time to time in keeping up the home, I hereby assign and transfer to you all of my equity in and to my membership on the Chicago Board of Trade, of which I am a member, and that upon the sale and disposition thereof, the proceeds derived therefrom are your sole property.

William Thayer."

From a judgment on the court's finding for the intervening claimant, this appeal was taken.

It is urged that the assignment is void as executed with the intention of defrauding the judgment creditor in an effort to collect said judgment, and as attempting to assign what is not assignable, namely, the board membership.

It is quite clear that the instrument assigns a contingent interest. It does not purport to assign the membership, but merely the proceeds that would be derived therefrom on the sale thereof. The binding effect in equity of the assignment of such interest is recognized in this State, and by the great weight of authority. In Jarvis v. Binkley, 306 Ill. 541, the court said that it "has repeatedly held that contingent interests and expectancies, although not assignable in law, may be transferred, so as to be binding in equity, by a contract made in good faith and for a valuable consideration," citing cases. (See also Ridgeway v. Underwood, 67 Ill. 419; Story's Eq. Juris. Sec. 1040; 5 Corp. Juris. p. 854; Williams v. West Chicago Street Ry. Co., 199 Ill. 57.)

The proceeds of the sale were therefore assignable in equity, and the title thereto took effect when they came into existence (5 Corp. Juris. p. 856), unless it can be said that the assignment was impeached for fraud.

In June, 1926, Helen M. Thayer was 28 years old, and had always lived with her father and mother. Since about October, 1916, she has been in the employ of Marshall Field & Company as a saleswoman,

time is now in keeping with the times, I have decided to
submit to you all of my property in and to my household
as the business of the house of which I am a member.
and that I have the same and the same in the same
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William Taylor.

From a statement of the court's finding for the following

statement, this report was made.

It is noted that the assignment is made as a condition

the interest of the assignor in the judgment is an effort to

obtain the judgment, and so as to avoid the same as to

the same, and so as to avoid the same.

It is also noted that the assignment is made as a condition

interest. It is also noted that the assignment is made as a

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The finding of the court is that the assignment of the same

is recognized in this case, and by the court as to the same.

In *Taylor v. Taylor*, 100 Ill. 2d, the court said that it was

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and in other capacities. Starting at \$9 a week her wages were gradually increased to \$17 a week before the assignment and to \$26 a week for the last four years. She also received bonuses from time to time, approximately \$300 prior to the assignment, and \$500 since that time. Prior thereto she had given her father practically all her earnings, also \$300 that came from her grandmother, amounting in all to \$1,000, as testified to by both of them. The exact amount could not be told owing to the fact that the memoranda kept of such indebtedness was destroyed after execution of the assignment.

In December, 1920, they had trouble which led to the agreement embodied in the instrument in question. She had done and continued to do considerable housework for her father, and thereafter paid him \$15 weekly from her wages and additional sums from time to time for rent or general household expenses, and sometimes for insurance or for his Board of Trade dues. At one time she drew out her entire savings account of \$193 and gave it to him.

At the time the judgment was entered against her father she heard it talked about but made no special inquiries and knew nothing of the execution thereon, and supposed the matter was settled in some way. But we find nothing in the evidence to indicate that she did not act in perfect good faith or that there was any concert of action to defeat collection of the judgment. Her father was evidently hard pressed for money, and she was continuing to make him advances before the judgment and after her majority. While the precise amount of money she gave him in the period of ten years or more was not definitely shown, she nevertheless had a valid claim against him prior to the judgment, and it cannot be questioned that the assignment was supported by a valuable consideration. Thereafter

The committee has of each individual was destroyed after
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 and in other instances. Starting at the end of the year were

in December, 1940, they had already taken her to the
government hospital in the treatment of gonorrhea. He had then
and continued to be hospitalized between 1940 and 1941, and
thereafter until his death in 1942. The report of his death
states that he died of a heart attack, and that
he was buried in the cemetery of St. John's Church. At the
time the above was being written in 1942 and again in

On the 11th day of January, 1901, the following was received from the Honorable Secretary of the Interior:

Washington, D. C., January 11, 1901.

Sir:

I have the honor to acknowledge the receipt of your letter of the 10th inst., and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,
Your obedient servant,
J. M. Smith,
Secretary of the Interior.

she not only advanced more money but rendered personal services on faith in its validity and apparently without any concerted action or intent on her part to defraud the judgment creditor. She had previously requested her father to sell the membership but the sale was deferred on the suggestion that it would shortly bring more money. At her request it was finally sold, and directions were given the broker to pay her the net proceeds, and he had already made out a check to her for the same when summoned herein as garnishee.

While no proof was made of the value of her services rendered after the assignment, and the amount of money she gave her father is manifestly much less than the proceeds from the membership, yet mere inadequacy of consideration without fraud would not prevent the passing of title to the proceeds under the assignment. (5 Corp. Juris. p. 856.)

Certainly the father is in no position to question the assignment, and if he is bound thereby the judgment creditor must also be bound; for if the latter recovers at all it must be in the name of William Thayer for the creditor's use upon the theory that the proceeds of the sale were not assignable or that the assignment was fraudulent. (Williams v. West Chicago Street Ry. Co., 188 Ill. 57.)

We think the judgment in favor of the intervening claimant should be sustained.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

ANALYTICAL LABORATORY SERVICES, INC. 10000 W. 10TH AVE. DENVER, CO 80231

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Journal of the American Medical Association

• 1960 •

278 - 31889

DAISY LIDDELL,
Appellee.

v.

WESTERN LIFE INSURANCE
COMPANY, a corporation,
Appellant.APPEAL FROM MUNICIPAL
COURT OF CHICAGO.MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The only question involved and argued on this appeal is whether or not an amended affidavit of merits, stricken from the files, states a good cause of action.

The action is brought by the beneficiary of an assessment life insurance policy issued by defendant insuring the life of Ira Liddell, the son of plaintiff, promising payment of \$220 upon his death.

After filing the first affidavit of merits an order was entered requiring a more specific affidavit. Three more were in turn filed and stricken, each setting up substantially the same ground of defense. It is unnecessary to state wherein they varied. The fourth affidavit of merits relied upon sets up that the insurance was made in consideration of the application, "which is made a part of the policy," and that the decedent obtained the policy by false and fraudulent representations of the disease which caused the death of "her" (his) brother, Lynch Liddell; that "her" (his) answer to question No. 16 of said application was untrue; that said Lynch Liddell died November 4, 1934, from consumption or pulmonary tuberculosis, and that said answer was material to the risk and relied on by defendant; that

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The only question involved in this case

is whether or not the applicant is entitled to

from the State a grant of money

The action is brought by the applicant of an

applicant for a grant of money by the State

the fact of the applicant's residence in the State

of the State is not in issue

that being the fact of the applicant's residence

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said concealed fact was material to the risk and contributed to the death of plaintiff's decedent. The defendant tendered therein all premiums received on the policy.

The policy was set out in full in the statement of claim and makes the application part thereof. The application is attached to and made part of defendant's first and second affidavit of merits. It is made part of but not attached to the third and fourth affidavit of merits, each of which, however, purport to be an amended affidavit of merits.

Because the application is not appended to the final amended affidavit of merits but only referred to therein, appellee urges that it cannot be considered. In the absence of the rules of the Municipal court where simplified procedure obtains we are not disposed to give force to this hypercritical technicality. The question presented and argued is whether defendant presented a good defense; in other words, whether the alleged misrepresentation was material to the risk and would avoid the policy.

Appellee recognizes that under authorities, unnecessary to cite, a representation as to the cause of death of the applicant's relatives may be material and will avoid the policy if untrue, but contends such authorities are not applicable to a company like defendant, organized under the laws of this state authorizing the issuance of an industrial policy issued upon a weekly premium plan. The contention is that the provision in section 216, Smith-Hurd's Revised Stats. 1928, providing that "unless the contract shall have been avoided by fraud, or by breach of its conditions, the corporation shall be obligated to the beneficiary," etc. must be construed as requiring avoidance of the policy prior to the contingency of death therein referred to. We think the point is untenable, and that a good defense was pleaded on which there should have been a trial.

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10-10-68

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

Investment of \$1,000,000 Jan. 1, 1961 to Jan. 1, 1962

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The following information was obtained from the records of the
Department of the Interior, Bureau of Land Management, and the
Bureau of Reclamation, and is being furnished to you for your
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Accordingly the judgment is reversed and the cause remanded for trial on the issues so raised.

REVERSED AND REMANDED.

Gridley and Seanlan, JJ., concur.

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291 - 31902

CLARA L. DAVIS,
Appellant.

v.

CITY OF CHICAGO,
Appellee.APPEAL FROM CIRCUIT COURT,
COOK COUNTY.MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action against the city to recover damages for injuries resulting from plaintiff's slipping on ice that had accumulated in a depression in a sidewalk. The error complained of is in granting a motion to direct a verdict for defendant at the close of plaintiff's evidence.

The evidence tended to show that there was a depression or low place in the sidewalk in question into which water gathered and froze; that the sidewalk was covered by a slight fall of snow the night before plaintiff met with the accident by slipping and falling on the ice covering the depression.

The declaration was predicated on the duty of the city to keep and maintain its sidewalks in good condition and in a proper and reasonable state of repair, free and clear of all unreasonable obstructions and dangerous conditions, and charges that it negligently and wrongfully suffered and permitted said sidewalk to be and remain in bad and unsafe repair and condition, and the flags or blocks of which it was constructed or laid to be and remain lower than the other flags or blocks of said sidewalk, and wrongfully and negligently suffered ice to accumulate in said low place on top of the low flag or

or block, and the evidence fully supported such allegations.

The same points raised here were considered in case No. 29035, Yerman v. City of Chicago, in which an opinion was filed February 11, 1925, wherein it was held that a like declaration making the same charge as in this case stated a good cause of action, and that the jury was properly instructed upon a like state of facts that if a sidewalk is itself in a defective condition, having holes or depressions in which snow or ice accumulated, and such defective condition proximately contributes to cause the accident complained of, then such defective condition, together with the accumulation of snow or ice, may constitute the proximate cause for falling. The verdict and judgment in that case were against the city and the Supreme Court denied an application for a writ of certiorari to review the same. Hence we deem that decision conclusive of the points raised here, and that the court erred in directing a verdict, as aforesaid, against plaintiff.

Accordingly the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

on which, and the evidence fairly supported such a conclusion.
 The same points raised have been considered in some
 cases, *Young v. State of Illinois*, in which an opinion was
 filed January 11, 1912, wherein it was held that a
 declaration setting the same charge as in this case stated a
 good cause of action and that the jury was properly instructed
 upon a like state of facts that it is entitled to find in a
 defective condition, which alone is sufficient to hold them
 on the same basis, and such defective condition previously
 mentioned is found the instant complaint of, from which
 defective condition, together with the condition of them at
 last, are essential to the recovery of the claim. The
 record and judgment in that case were affirmed, the city and the
 common council being on appeal for a writ of certiorari.
 In view of the case, there is no doubt that the condition of
 the claimant raised here, and that the court was in error in
 finding, on the evidence, against liability.

Accordingly the judgment is reversed and the cause

remanded.

REVERSED AND REMANDED.

Griffey and Scamman, JJ., concur.

401 - 31533

SAMUEL HASTERLIK,
Appellant,

v.

LILLIAN K. HASTERLIK et al.,
Appellees.} APPEAL FROM CIRCUIT COURT,
} COOK COUNTY.

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by complainant from an order of the Circuit court, entered June 2, 1926, wherein the court refused to follow the recommendation of the master and tax as costs \$5,000 for complainant's solicitor's fees in a partition proceeding. Certain defendants contended before the chancellor that, under the pleadings and the facts, such fees could not properly be taxed as costs under section 40 of the Partition Act, and this is the only question involved in the present appeal. The entry of the partition decree of April 23, 1923, was contested by the same defendants, but our Supreme Court, after modifying it in a certain particular, affirmed it as modified on February 17, 1925. (Hasterlik v. Hasterlik, 316 Ill. 72.)

It appears from the allegations of complainant's bill, filed March 22, 1922, and from evidence introduced in support thereof, that the land sought to be partitioned consisted of certain lots, located at the southeast corner of West Van Buren and Aberdeen streets, Chicago; that it was improved with a three-story building used for manufacturing purposes and also with another building containing stores and flats; that the property was owned by the complainant, Samuel Hasterlik, and the heirs and devisees of his deceased brother, Ignatz Hasterlik, as tenants in common; that the three-story building was occupied by the Rothchild Colortype

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412 - 1112

THE UNITED STATES OF AMERICA
DISTRICT COURT OF THE DISTRICT OF COLUMBIA
IN RE: THE ESTATE OF JAMES EARL RAY, DECEASED
JAMES EARL RAY, PETITIONER
JAMES EARL RAY, PETITIONER
JAMES EARL RAY, PETITIONER

THE UNITED STATES OF AMERICA

THIS IS an appeal by complaint from the order of the
court, entered June 2, 1964, denying the writ of habeas
corpus. The petitioner, James Earl Ray, was born in
Murfreesboro, Tennessee, on January 5, 1928. He is
now residing at the Federal Reformatory for Women,
McLennan County, Texas. He was convicted of the
murder of Dr. Martin Luther King, Jr., on April 4, 1968,
and sentenced to the Federal Reformatory for Women,
McLennan County, Texas, for a term of 99 years.
The petitioner, James Earl Ray, was born in
Murfreesboro, Tennessee, on January 5, 1928. He is
now residing at the Federal Reformatory for Women,
McLennan County, Texas. He was convicted of the
murder of Dr. Martin Luther King, Jr., on April 4, 1968,
and sentenced to the Federal Reformatory for Women,
McLennan County, Texas, for a term of 99 years.

McLennan County, Texas

It appears from the affidavit of the petitioner's
counsel that the petitioner, James Earl Ray, was
born in Murfreesboro, Tennessee, on January 5, 1928.
He is now residing at the Federal Reformatory for
Women, McLennan County, Texas. He was convicted of
the murder of Dr. Martin Luther King, Jr., on April
4, 1968, and sentenced to the Federal Reformatory
for Women, McLennan County, Texas, for a term of
99 years. The petitioner, James Earl Ray, was born
in Murfreesboro, Tennessee, on January 5, 1928.
He is now residing at the Federal Reformatory for
Women, McLennan County, Texas. He was convicted of
the murder of Dr. Martin Luther King, Jr., on April
4, 1968, and sentenced to the Federal Reformatory
for Women, McLennan County, Texas, for a term of
99 years.

Co. under a written ten year lease dated January 30, 1919; that the stores and flats were occupied by various persons as tenants from month to month, none of whom had written leases; that Ignatz Masterlik died testate on May 18, 1921, leaving him surviving his widow, Lillian K. Masterlik, and three infant children, a daughter and two sons, the eldest of whom would not reach her majority until January, 1928; that Ignatz's will was probated and letters-testamentary issued to the executors on January 18, 1922; that certain persons, including Lillian K. Masterlik, were named in the will as trustees for the children; that she, the mother of the children, had been appointed guardian of their estate, and, as widow of Ignatz, she had renounced the will and elected to take her dower and legal share of the estate in accordance with the statute; that complainant desired partition of the premises and had frequently applied to the other owners but that his requests had been refused, etc. The three children were not made parties to the bill, and the persons who were alleged to be in possession as tenants of said stores and flats were not made parties.

On May 3, 1922, Lillian K. Masterlik, having employed counsel, filed a demurrer to the original bill, individually, and as one of the trustees, and as guardian of the estate of the three children. Among the stated grounds of demurrer were: (1) That the children were not made parties; and (2) that the bill did not show that it was for their best interests that a partition or sale of the premises be made. The court sustained the demurrer as to the first ground but overruled it as to the second. Thereafter complainant filed an amended bill, substantially the same as the original, making the children parties, and a guardian ad litem was appointed for them and he filed an answer, as did all the other parties defendant (save one who was defaulted) and the cause was referred to a master. In the answer of Mrs. Masterlik (individually, and as trustee, and as

guardian, etc.) she alleged that the real estate consisted of a tract of land, 100 by 160 feet, improved with the two buildings; that a physical partition could not be made without in a great measure destroying its value and utility, from which premises a regular and adequate income was being received; and that "it is contrary to the best interests of said infant children that the property be partitioned or sold."

From evidence taken before the master, it appeared that there were 18 tenants in possession of the stores and flats who had not been made parties to either original or amended bill, and in November, 1922, complainant was given leave to file, and filed, an amendment to the amended bill making them parties, and, thereafter, all of them joined in filing an answer, in which they stated that they were tenants in possession from month to month under oral leases.

In the decree of April 23, 1923, the court awarded partition, directed the commissioners to allot and assign to Mrs. Masterlik her dower, and further directed them, if they found partition could not be made without manifest prejudice, etc., to appraise the value of each parcel, and make report, etc. From this decree Mrs. Masterlik (individually, and as guardian, etc.) appealed to the appellate court, but the appeal was transferred to the Supreme Court because a freehold was involved (234 Ill. App. 572.) Subsequently the Supreme Court affirmed the decree (316 Ill. 72) after modifying it by striking out a clause reading "that no good or substantial defense has been interposed by any of the parties to this suit, and that the interests of the parties have been correctly stated and set forth." It appears that appellant objected to the retention of the clause in the decree upon the ground that "it may serve as an adjudication of the question whether the complainant is entitled to have his solicitor's fees

taxed as costs;" and the Court said (p. 78): "The decree makes no finding with respect to solicitor's fees, and inasmuch as all parties agree that the language of which complaint is made is not necessary to a decision of the questions before the court the decree will be modified by striking out this finding."

Following the report of the commissioners that the premises were not susceptible of division without manifest prejudice, etc., and showing their appraisal of the value thereof to be \$225,000, the court, on January 30, 1926, decreed that the premises be sold, etc. Subsequently the master filed his report that the same had been sold for \$151,450, and he set forth in his account various items of costs to first be allowed to complainant out of the funds received from the sale, including \$5,000 to complainant for his solicitor's fees. On the question as to the propriety of this allowance he states that "it is one not free from doubt." To that portion of the report, making the allowance, Mrs. Masterlik (individually, and as a trustee and as guardian) and said infant defendants, by guardian ad litem, filed exceptions, and subsequently the court sustained them, and entered the order appealed from. In these exceptions, which epitomize their contentions here made in support of the court's order, they stated that "the master should have found that the rights and interests of all the parties in interest were not correctly set forth in the original bill or amended bill, that a good and substantial defense was interposed to the bill by certain defendants; and that they necessarily and properly appointed separate counsel to represent their interests."

The general rule has always prevailed in this State that solicitors' fees cannot be taxed as costs in chancery suits without statutory authority, and that, although a court of equity has discretion in awarding costs, it must confine that discretion to the

fees authorized by statute. (Metropolitan Life Ins. Co. v. Kinsley, 269 Ill. 529, 530; Constant v. Matteson, 22 id. 546, 550; Wilson v. Clayburgh, 218 id. 586, 597.) In the Revised Statutes of 1845, section 11 of chapter 79, entitled "Partitions," provision is made for the sale of lands, etc., where they are so circumstanced that a division thereof cannot be made without manifest prejudice, etc., and the concluding clause of the section provides: "The court to make such order in relation to costs as shall seem right." While this section and act were in force, a bill for partition was filed by some of the heirs of one Strawn, deceased, against their co-heirs and the widow. The circuit court taxed as costs against the defendants their share of \$3,600, as fees to complainants' solicitors, and our Supreme Court, while affirming the decrees for partition in all other respects, reversed that portion which taxed the fees in part against the defendants. In the opinion of the Court (Strawn v. Strawn, 46 Ill. 412, 414) it is said: "On what basis this fee was fixed does not appear, but that it was improperly taxed against the defendants there can be no doubt. The proceeding was not an amicable one. The defendants appeared by their own solicitors, as they had the right to do, and why they should be required to assist in paying the counsel of complainants we do not perceive. Here was a great estate to be divided, and if the parties could not agree upon a division, and litigation became necessary, each was entitled to have his interests protected in court by counsel of his own selection, and one party can not, under our practice, be compelled to pay the fees of the other." By "An Act to amend Chapter 79 of the Revised Statutes of 1845," in force April 16, 1869, (Laws 1869, p. 348), it was provided: "That in proceedings * * for the partition of real estate, or for the assignment of dower, or for either, it shall be lawful for the court to order that a reasonable fee be allowed the solicitor or solicitors prosecuting, to be

determined by the court, which shall be taxed as costs, and divided pro rata between the parties to the proceeding, according to their respective interests." This amendment was considered by our Supreme Court in Kilgour v. Crawford, 51 Ill. 269. In that case Crawford and wife commenced a proceeding in partition against the Kilgours for the purpose of dividing 40 acres of land. The commissioners reported that the land was incapable of division without manifest prejudice, etc., and the circuit court entered a decree of sale. One of the errors assigned on appeal was, that the lower court had allowed \$100, as fees to complainants' counsel, and had directed the sum to be taxed as costs, pro rata, against all the parties. In reversing the decree and remanding the cause the Court said (p. 255):

"The terms of the law are not mandatory. * * Where the proceedings are amicable and the parties defendant do not deem it necessary to employ counsel to protect their interests, it is proper that the power given by this law should be exercised, as all the parties have the benefit of the partition. But where the defendants deem it necessary to employ counsel, in order to protect their interests and secure a just partition, * * we can see no reason why they should be required not only to pay the fees of their own counsel but also a part of the fees of adverse counsel. * * We are satisfied the act should be construed as intending the taxation of counsel fees only in cases where the proceedings are amicable."

In the revision of the law as to partition, in force July 1, 1874, section 40 of the act of revision (Hurd's Stat. 1874, p. 753) reads as follows: "In all proceedings for the partition of real estate, the court may apportion the costs, including the reasonable solicitor's fees, among the parties to the proceeding, so that each party shall pay his equitable portion thereof." In the case of Cowdrey v. Hitchcock, 103 Ill. 262, decided in 1884, it was held, following the decision in the Kilgour case, supra, that this statute of 1874 applied only to amicable suits for partition and not to cases where defendants have employed counsel for themselves to protect their interests.

By an Act, approved June 4, 1889, the Legislature amended

section 40 of the revised act of 1874, so that it read as follows (Laws 1889, p. 215):

"In all proceedings for the partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the petition or bill, the court shall apportion the costs, including the reasonable solicitor's fee, among the parties in interest in the suit, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some one of them, shall interpose a good and substantial defense to said bill or petition. In such case the party or parties making such substantial defense shall recover their costs against the complainant according to equity."

The present section 40 is the result of a further amendment in 1923 (Laws 1923, p. 479) but it will be noticed that, so far as concerns the solicitor's fee of a complainant, the statute is not materially changed. Since the amendment of 1889, which is more mandatory in its language than the prior acts, the section has received construction by courts of review in this State.

Concerning the clause therein, reading "when the rights and interests of all the parties in interest are properly set forth in the petition or bill," it has been held that where the proceedings are not amicable, and where the complainant has omitted in his original bill to include necessary defendants, thereby rendering it necessary for the defendants served to employ counsel to protect their interests, the fee of complainant's solicitor should not be taxed against the defendants. (Hartwell v. DeVault, 159 Ill. 325, 336; Wachter v. Deerr, 210 id. 242, 245; Mansfield v. Wallace, 217 id. 610, 635; Smith v. Hard, 146 Ill. App. 118, 119; Switzer v. Henn, 124 id. 343, 349; Finlen v. Foster, 211 id. 609, 611.) In the Hartwell case it is said: "We have held, in regard to this statute, that, where the proceedings are not amicable, and the defendants deem it necessary to employ counsel in order to protect their interests, and secure a just partition * * , they should not be required to pay the fees of adverse counsel, as well as of their own counsel. (Cowdrey v. Hitchcock, 103 Ill. 262, Stuns v. Stuns, 131 id. 210.) Here, the appellant

neglected in her original bill to make two tenants in common with her parties to the bill; and their names and interests were brought to the attention of the court by the answers to the original bill; so that appellant afterwards amended her bill, making these persons parties defendant, * * . This omission seemed to render it necessary to employ counsel to protect the interests of the omitted defendants, and, taken in connection with the fact, that the proceeding has not been an amicable one, but hotly contested by the parties, justified the court below in refusing to tax the fee of complainant's solicitor against the defendants." In the Wachter case, supra (p. 245) it is said: "The decree was also erroneous as to solicitor's fees, both because the suit was defended in good faith and because the titles and interests of all parties in the premises were not correctly set forth in the bill. The omission of necessary parties made it proper for defendants to employ counsel to protect their interests. In such a case they should not be compelled to pay a share of the fees of complainant's solicitor." In the Mansfield case, supra, (p. 635) it is said: "The reasonable solicitor's fee can only be apportioned, as a part of the costs, among the parties in interest in the suit, when the rights and interests of all such parties are properly set forth in the bill or petition." In the Switzer case, supra, (134 Ill. App. 348) it is said: "The bill should be so accurate that the parties defendant can safely allow a default to be taken against them." In Hurlbut v. Talbot, 275 Ill. 356, 363, reasons are given why it is essential in partition suits that all persons having or claiming any possible interest in the lands should be made parties, as required by section 6 of the Partition Act.

Concerning the clause of the statute reading "so that each party shall pay his or her equitable portion thereof, unless the defendants, or some one of them, shall interpose a good and substantial defense to said bill or partition," it has been held

that "the fact an answer is filed or a frivolous defense interposed should not be allowed to defeat the operation of the statute, if the bill or petition sets forth the rights and interests of the parties correctly." (McMullen v. Reynolds, 209 Ill. 504, 516); yet it is stated in that case (p. 516) that, "when the court can see that it is necessary for the defendants to have counsel to protect their interests and to insure a just partition of their estate, and that the solicitor of the complainant represents alone the interests of the complainant, and that it would be inequitable to require the defendants to pay their own counsel and contribute toward the payment of complainant's counsel also, the court should not tax complainant's solicitor's fees as costs." In Metheny v. Bohm, 104 Ill. 495, 501, it was held in substance that a defendant in a partition proceeding should be exempted from paying a part of his adversary's solicitor's fee, although the interests of the parties are properly set forth in the bill, where his defense is substantial in character, made in good faith and upon reasonable grounds, and interposed to what he believes is a hostile attack on his interests, though such defense may prove unsuccessful. (See, also Bliss v. Sealey, 181 Ill. 461, 477; Jones v. Young, 228 id. 374, 379; Hynes v. Jennings, 262 id. 266, 278.)

In view of these authorities, and considering the pleadings and the facts as disclosed in the present transcript, we are of the opinion that the circuit court was amply justified in refusing to tax as costs for complainant's solicitor's fees the sum of \$5,000, or any part thereof, and in entering the order appealed from. Necessary parties were not made parties defendant to complainant's original bill and that fact was brought to the attention of the court by Mrs. Masterlik, acting for herself and as a trustee and as guardian for the minor children, by demurrer to the bill, which resulted in the demurrer being sustained and complainant filing an amended bill. We think that this failure of complainant

to make said children parties to the bill alone warranted Mrs. Masterlik as their mother and as guardian of their estate, in employing counsel to protect their interests. (Nichter v. Boerr, 210 Ill. 242, 245.) Subsequently, before the master, it appeared that certain tenants in possession of portions of the premises, who should have been made parties, had not been made parties, and accordingly the bill again was amended. Furthermore, it appears that the partition proceeding was not an amicable one. Complainant and the heirs and devisees of his deceased brother were the owners, as tenants in common, of the premises sought to be partitioned. Said heirs and devisees were the three minor children and Mrs. Masterlik, widow of the deceased. The children's interest had been devised to certain trustees in trust for them. The premises were improved with two buildings, which were producing an income, and an equitable division could not be made, and if partition were decreed they would have to be sold. Mrs. Masterlik in good faith believed that it would not be for the best interests of the children that partition be decreed and a sale made. Accordingly, she employed counsel to represent their interests, as well as her own interest, and in good faith defended the suit and contested the entry of the decree prayed for. Although her defense proved to be an unsuccessful one, we are unable to say that her defense as guardian of the children's estate was "merely formal, frivolous or vexatious." (See Motheny v. Bohn, supra.) And we think that, under all the facts and circumstances, it would have been inequitable, and in violation of the children's interests and rights, for the court to have decreed that they should pay, indirectly, any portion of complainant's solicitor's fees.

The order of the circuit court appealed from should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

453 - 31585

DELPHINE MAGNAN,
Appellee,

v.

THE CHICAGO CINDER CO.,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries, received by plaintiff in an automobile accident on the morning of December 13, 1924, there was a verdict and judgment against defendant for \$14,000 in May, 1926, and this appeal followed.

Plaintiff, about 33 years of age, lived at 4728 Greenwood avenue, Chicago. Her husband was dead and she had three minor children. She was employed as a comptometer operator in the office of the Rec Meter Car Co., at 45th street and Indiana avenue. Leonard H. Maunder, another employee of that company and the owner of a Rec touring car having top and curtains, was accustomed each morning to drive down town from his residence near 71st street, and on the way occasionally invited other employees to ride with him to the office. On the morning in question he invited Dorothy Frank to accompany him, and later plaintiff. Miss Frank was sitting on the front seat to the right of Maunder, who was driving the car. After plaintiff had seated herself on the rear seat, the car proceeded northerly on the east side of Greenwood avenue. When it was approaching 45th street, and going at a speed of about 20 miles per hour, defendant's large auto-truck, driven by one of its chauffeurs easterly on 45th street, made a wide turn into Greenwood avenue and proceeded southerly on the east or wrong side of the street, near the curb. To avoid a head-on collision Maunder checked the speed of his car and turned it towards the west, but about 100 feet south of 45th street, the hub

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of its right wheel came in contact with the right front corner of the truck with such force that the engine of the truck was knocked off its "legs," which attached it to the frame of the truck, and the touring car was thrown and skidded towards the west, coming to a standstill in the street facing easterly with one or both of its rear wheels over the west curb. Plaintiff, seated inside reading a letter, and unaware of the impending collision, was thrown violently against parts of the car and rendered unconscious, and was so seriously injured that she immediately was taken to the Mercy Hospital, Chicago.

Plaintiff's declaration consisted of four counts and an additional count, to which defendant pleaded the general issue. The first count charged general negligence in the driving of the truck. The second charged negligence in driving it on the left hand (or east) side of the street in violation of the statute. The other counts charged negligence in driving it at an excessive and dangerous rate of speed while turning a corner, in violation of different statutes mentioned. Each count alleged with considerable particularity the serious and permanent character of plaintiff's injuries, expenses incurred for hospital bills, doctor's and nurses' services, braces, etc., and loss of income, etc.; and further alleged that, prior to the accident, she was active and well, attended to her usual business work, earned and received a substantial salary, and "was a widow and mother of three young children whom she supported and maintained," but that since receiving her injuries she has been hindered and prevented from following her usual occupations, etc.

While not contending that at or immediately before the accident plaintiff failed to exercise due care for her own safety, or that Maunder's claimed negligence can be imputed to plaintiff, one of the contentions of defendant's counsel is, that the verdict is

manifestly against the weight of the evidence on the question whether defendant's chauffeur, in driving the truck as he did, was guilty of negligence which proximately contributed to plaintiff's injuries. After reviewing the evidence and the arguments of counsel relating thereto, we do not think there is any merit in the contention.

Nor do we think that the facts, that during her cross-examination on the trial plaintiff became faint, and subsequently on a second occasion while defendant's attorney was making his closing argument to the jury she actually fainted in the rear of the court room, amounted to prejudicial conduct on her part, requiring a reversal of the judgment, as urged by defendant's counsel. Plaintiff was of slight build, weighing about 95 pounds, had an impaired constitution and had been under considerable strain during the trial. She had a right to be in the court room. When she fainted the court suspended the trial and directed the jury to retire to the jury room, which they did. Thereupon, not in the jury's hearing, there was a colloquy between the court and defendant's attorney. The court expressed the opinion that, because plaintiff was sitting so far away from the jury box when she fainted, the jury did not notice the incident, that she probably had fainted because of the heat, and that she was not malingering. Defendant's attorney stated that, although he also was of the belief that she was not malingering, the jury must have observed the incident, and he requested that he be allowed to interrogate them as to whether they had or not. The court granted the request, and the jury, after their return into the box, were interrogated, and it appeared that two of them had noticed that plaintiff had fainted. Thereupon the court (addressing the jury) said: "Of course, gentlemen; we can't stop people from fainting. * * It is rather warm in this room. * * You understand that, in trying this law-suit, you are trying it on the evidence and the law. You

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are to decide this case on the law and the evidence, without prejudice, without sympathy and without bias. And the fact that this occurrence happened and some of you observed it, of course should have no influence with you in arriving at a verdict. Do all you gentlemen understand that?" To this question all of the jurors answered in the affirmative. And thereupon the court denied defendant's motion that a juror be withdrawn and that the cause be continued. Under the facts and circumstances connected with the incident, and considering the court's admonitions and other facts and circumstances in evidence, we do not think that the court erred in the ruling.

Complaint is made of the giving by the court of instructions Nos. 13 and 28, offered by plaintiff. We have examined them in connection with the other given instructions and the facts and circumstances in evidence, and do not think that the giving of them constituted error, or, if error there was, that it was so prejudicial to defendant as to warrant a reversal of the judgment.

The main contentions, upon which defendant's counsel rely for a reversal of the judgment, are (1) that the verdict is excessive, and (2) that its excessiveness indicates passion and sympathy on the part of the jury, brought about by the court erroneously permitting plaintiff on her direct examination to state that she was a widow, that her husband died about three years before the trial and that she had three children.

After reviewing the evidence as to the character and permanency of plaintiff's injuries and her pain and suffering, and considering her payments made or liabilities incurred for hospital bills, doctor's and nurses' services, the cost of a steel brace, and the loss of her monthly salary of \$130 during the six months' period before she resumed work in the office of the Hec company, aggregating about \$1000, we cannot say that the verdict is excessive.

the is better than the one we had the previous, which was
 better, without changing and without being, and the fact that
 this movement happened and was not changed it, in some
 should have no influence with you in relation to a verdict.
 all the previous movements that. In this question all of the
 laws involved in the situation. The situation was very simple
 defendant's motion was a letter to witness and that the witness
 defendant. From the facts and circumstances involved with the
 incident, and including the facts of the situation and other facts
 and circumstances in evidence, we do not think that the court erred
 in the ruling.

Conclusion is made by the state of the evidence.
 Yes. It was not, without any doubt. We have reached that in
 connection with the other given instructions and the facts, and
 circumstances in evidence, and we do not think that the giving of them
 warranted error, or, if error there was, there is no prejudicial
 to defendant as to require a reversal of the judgment.

The state defendant, upon which defendant's counsel rely
 for a reversal of the judgment, are (1) that the verdict is excessive,
 and (2) that the excessive verdict included passion and prejudice on the
 part of the jury. I would agree with the court's reasoning regarding
 passion and prejudice on the first proposition in that there was a witness
 that was present who heard those words between the trial and that the
 was given evidence.

After reviewing the evidence as to the state of mind
 of defendant at the time of the killing and the facts and circumstances,
 including the fact that the defendant was in a state of mind
 that, under the facts, evidence, the state of a mental state,
 and the facts of the case, that the defendant was in a state of
 mind that was present with the facts of the case, we cannot say that the verdict is excessive.

Prior to the accident she was active and in excellent health, was regular and diligent in her business work, had performed without assistance all household duties, and had not experienced any trouble or weakness in her back. After reaching the hospital she was placed in bed and remained there practically the entire time until a few days before she left the hospital on January 26, 1925. She remained unconscious for several hours after her arrival there, and after recovering consciousness she suffered and continued constantly to suffer intense pains in her back and spine. She could not raise her arms or be moved in bed without greatly increasing the pains. She was attended by Dr. Edward L. Moorhead, chief surgeon for many years at the hospital. Two X-ray pictures were taken, one on the day of the accident and the other two days later. Because of her then condition proper views of the spine could not be procured, and on January 6, 1925, a third X-ray picture was taken, showing the abnormal conditions of the spine. Dr. Moorhead, referring to this picture (plaintiff's exhibit 3) testified: "It is a lateral view of the spine, and shows a narrowing of the first lumbar vertebra of at least half an inch, the anterior surface of the body, throwing the spine of the last dorsal and the first lumbar vertebra out of line posteriorly at least half an inch, - that is, a bowing of the back, forward of the chest and outward of the back. * * It is an abnormal condition, and it must have come from outside injury or violence. * * The effect upon the patient is to cause deformity, pain, inability to assume the erect position without artificial support, weakening of the back, interfering with his standing or sitting erect, and interfering with his stooping over to the floor. * * From my experience in surgical cases and my examination of the pictures and the patient, such a condition is not curable. The spine will never recover its normal condition." On November 3, 1925, about six months before the trial, two other X-ray pictures (exhibits 4 and 5) were taken at the

hospital, and as to these Dr. Moorhead further testified that they "did not show any marked change of condition in the spine," and that "this piece of vertebra still is narrow, as it was before."

Dr. Moorhead further testified: "I recently examined Mrs. Magnan. Her condition is practically the same. When she was in the hospital after the accident, I had a brace made for her that she might have when she left. It is called a corset brace. It rests upon the hips, with two crutches going under the arms, and is so arranged as to take the weight off the spine. * * It holds her in a straight position so she cannot bend that part of the spine forward or backwards while the brace is on. * * These crutches have vertical steel pieces running down which may be adjusted to set them at the proper height to take the weight off * * . The condition that I found the patient in on the recent examination will continue to exist, but for how long I cannot tell. I regard it, however, as being permanent." In response to a question put by the court, as to "whether there was a fracture or just something pushed out of place," the witness replied: "It looks as though the body of the vertebra is crushed together * * The body of one of the vertebrae is broken * * This crushing caused an angulation of the spine." About the time that the X-ray pictures, exhibits 4 and 5, were taken, plaintiff, at defendant's request consented to be examined at Mercy Hospital by a Dr. Cubbins, employed by defendant, and she was examined by him. Defendant, however, did not see fit to call Dr. Cubbins as a witness on the trial, but it called Dr. George J. Aste (who had never examined plaintiff) as its medical expert. He expressed certain opinions, based upon examination of the five X-ray pictures and upon certain hypothetical questions, which were contrary to those of Dr. Moorhead, as to the permanency of plaintiff's injuries and as to her present condition being the result of the injuries received at the time of the accident. He, however, stated that "unquestionably the accident had something to

do with her condition." His testimony did not, in our opinion, lessen the force and effect of that of Dr. Moorhead. Plaintiff testified in substance that, except when sleeping, she had constantly worn the brace or crutches from the time she left the hospital in January, 1945, and was still wearing it; that after she left the hospital until she resumed her work with the Eeo company in June, 1945, she was in bed at home most of the time, and that she suffered much pain; that only by lying flat on her back could she be free from pain; that lying in any other position caused pain and this condition still continues; that her work as a comptometer operator is somewhat similar to that of running a typewriter; that now, even with the assistance of the brace, she cannot comfortably work more than half an hour at a time; that her work which seemed easy before the accident now tires her and at times causes pain; and that now she cannot do household work or use a sewing machine without much discomfort and pain. We think that the jury were fully warranted under the evidence in assessing her damages at \$14,000.

As to counsel's second point, that the excessive verdict was brought about by the court erroneously permitting plaintiff to give the testimony mentioned, it has frequently been decided by our Supreme court that the admission of similar testimony, over objection, is ordinarily ground for reversal because it is not relevant to the issue and is calculated to arouse the prejudices and passions of the jury and their sympathy for the injured plaintiff and thereby enhance the amount of the verdict. (City of Chicago v. O'Brennan, 65 Ill. 160, 163; Pittsburg, etc. R. Co. v. Powers, 74 Id. 341, 343; Jones & Adams Co. v. George, 227 Id. 64, 70.) And it has also been decided that, where such testimony has been admitted over objection, an excessive verdict cannot be cured by a remittitur. (Jones & Adams Co. v. George, supra.) But, if no objection is made to the admission of such testimony, the court in admitting it does not commit

to this fact, the Commission, in its report, has stated that the Commission has not been able to determine the exact date of the Commission's report, and that the Commission has not been able to determine the exact date of the Commission's report.

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an error. (Merrill v. Michigan Central R. Co., 158 Ill. App. 38, 41.) In the present case it had been shown by plaintiff's testimony, without objection, that she had children, and that before the accident, in addition to doing her business and household work, she had done all her own sewing and "the children's sewing." When she was asked to give the date of her husband's death and how many children she had, defendant's attorney objected. She was, however, allowed to answer the questions, the court stating that the evidence was admissible "for a certain purpose" and that "the jury will have to be told that they must not be governed by any sympathy." Later, in the series of instructions given, the jury were told that it was plaintiff's damages, if any, that were to be determined, etc., and that sympathy for her should have no influence with them in determining defendant's liability or control in any way their verdict. In City of Joliet v. Conway, 119 Ill. 489, 491, plaintiff recovered a judgment after verdict against the city in an action for personal injuries sustained by reason of a defective sidewalk. On the trial, she testified as to the extent and nature of her injuries and their effect upon her ability to labor, and further testified, without objection, that she had done household work for her family ever since she had been married. And there was evidence tending to show that in consequence of the injuries received she was incapacitated to perform such labor. She was then permitted to testify, over defendant's objection, that at the time of the injury she was doing the housework for her husband and eight children. It was urged that the admission of this testimony was reversible error. Our Supreme Court, however, affirmed the judgment. We think that this decision is peculiarly applicable to the present contention of defendant's counsel. (See, also, Hardin v. City of Moline, 179

Ill. App. 101, 103.) Furthermore, as under all the facts and circumstances in evidence the present verdict cannot be considered as excessive, or one brought about by passion or sympathy, we cannot see how the claimed error (if error there was) so prejudiced defendant as to require a reversal of the judgment.

For the reasons indicated the judgment of the Superior Court is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

For the reasons indicated in paragraph 4 of the
projected budgetary plan to finance a repayment of the
principal and interest on the loan, the Government of the
United States has agreed to provide a loan of \$100 million
to the Government of the United States for the purpose of
financing the repayment of the principal and interest on the
loan. The loan is to be repaid by the Government of the
United States in installments of \$10 million per year for
ten years, beginning in 1961. The loan is to be repaid
in U.S. dollars.

THOMAS MORGAN,
Plaintiff in Error.

v.

ILLINOIS CENTRAL RAILROAD
CO.,
Defendant in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action on the case, based upon the Federal Employers' Liability Act, brought against the defendant railroad company to recover damages for personal injuries sustained by plaintiff, the court, at the conclusion of all the evidence, instructed the jury to return a verdict finding defendant not guilty. This the jury did and on November 24, 1926, judgment was entered against plaintiff for costs and, subsequently, the present writ of error was sued out. The only error assigned and argued is that the court erred in giving said instruction and in not submitting the cause to the jury.

It is provided in said Federal Employers' Liability Act that every common carrier by railroad, while engaging in commerce between any of the several States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, - such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, etc.

The accident happened about 2 o'clock A. M., on August 8, 1924. Plaintiff was employed as a switchman for defendant. And his testimony tended to show that at that time, and prior thereto, he was working in that capacity in defendant's yards

at 90th street and Cottage Grove avenue, Chicago; that the train about which he then was and had been working consisted of 35 to 40 cars; that there was a defective coupler on one of them, and that, after giving a signal to the engineer to stop the engine and such cars as were attached thereto (which signal the engineer obeyed), he stepped upon the track and leaned over to adjust the coupler; that at that time there was a considerable space between the car having the defective coupler and the cars to which the engine was attached; that suddenly and without warning, and while plaintiff was engaged in making the adjustment, the engineer backed the engine and attached cars; and that as a result plaintiff was struck in the head, knocked down, and seriously and permanently injured.

We think that plaintiff's evidence was sufficient to warrant a jury passing upon the questions, whether plaintiff was injured at the time and place mentioned and whether the injuries were proximately caused in whole or in part by defendant's negligence, provided that his evidence, and all inferences justifiable therefrom, sufficiently disclosed the fact, essential to any recovery by him in this action, that at the time of his claimed injury he was engaged as defendant's employee in interstate commerce as distinguished from intrastate commerce. But we do not think that his testimony, taken as a whole, tended to show that at that time he was so engaged. The burden was upon him to so show (Menck v. Penn. R. Co., 246 Pa. 1; Rickinson v. Industrial Board, 330 Ill. 342, 344); and his was the only testimony on the point. On direct examination he testified as follows:

"From 11 o'clock p.m., when I went to work that night, up to the time of the accident, I was breaking up trains. We were switching cars in different tracks where they belonged. * * We were handling box cars and stock cars, loaded and unloaded. The loaded ones were going south to New Orleans, La.;

Birmingham, Ala.; Memphis, Tenn.; St. Louis, Mo.; and Champaign, Illinois.

Q. Now do you know the cars were going to those different points? A. They card them all; you can read them.

Q. And you did read them, did you? A. Yes, sir.

Just before I got hurt we were switching cars. The particular train I was working on at the time came from Clearing, Illinois. There were 35 or 40 cars on the tracks. * * The majority were loaded cars. * * The points south that they were going were New Orleans, Memphis, Birmingham, St. Louis and other places."

On cross-examination he testified:

"Q. As to the cars you say you were handling at the very moment you were injured, do you mean to tell the jury that you remember having examined those particular cars, and noticed cards on them as to where they were carded to, or that just generally during the night you were handling cars that were destined to New Orleans, Memphis, Birmingham and other places?

A. They are that way every night.

Q. As to the particular cars you were handling at the time you were injured, you have no specific recollection about those cars, have you?

A. Why no, I could not; but that is the way the cars go every night, night after night.

Q. We are not asking about the other nights; we are just making inquiry about this particular night; and, as I understand, you have no distinct recollection of having examined the cards on any of those cars you were handling at the time you were injured?

A. No, I never examined them because I got hurt.

* * * *

Q. You don't remember anything about those particular cars, where they were destined to?

A. No, I could not.

* * * *

Q. In other words, you were just switching indiscriminately there during the night; you handled cars of every character there?

A. Yes, sir, we did."

Although plaintiff's statements on his direct examination might, under the holdings in Evans v. Chicago, M. I. and P. R. Co., 266 Ill. 248, 251-2, if they stood alone, be considered sufficient to warrant the submission of the case to the jury on the issue whether at the time of the accident plaintiff was employed and actually engaged in interstate commerce, we think that his cross-examination

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

showed clearly that said statements were mere conclusions or opinions, not based on knowledge, and were of no evidentiary value. They were so qualified and contradicted on his cross-examination that they had no force and did not legitimately tend to prove a fact which was essential to a recovery by him. Other undisputed evidence showed that defendant operated a railroad in Illinois, which, however, extended into other states. In Pickinson v. Industrial Board, supra, it is said: "Not every employee of an inter-State carrier is engaged in inter-State commerce; if his work constitutes a real and substantial part of the inter-State commerce in which the carrier is engaged then the employee is engaged in inter-State commerce, otherwise not." In Illinois Central R. Co. v. Behrens, 233 U. S. 473, 478, it is said, quoting from Pedersen v. Delaware, etc. R. Co., 229 U.S. 146, at page 150: "There can be no doubt that a right of recovery thereunder (Federal Employers' Liability Act) arises only where the injury is suffered while the carrier is engaged ⁱⁿ interstate commerce and while the employé is employed by the carrier in such commerce." And (p. 152) "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" In Chicago B. & Q. R. Co. v. Harrington, 241 U. S. 177, 180, it is decided in substance that, unless the injured employee of an interstate and intra-state carrier is engaged in inter-state commerce at the time of the injury, the Federal Employers' Liability Act does not apply, and that it is immaterial whether such employee previously had been, or in the immediate future was to be, engaged therein. In Cisena v. Walters, 100 Ill. 623, 628, it is said: "Where, as in the present case, a party or witness makes a general statement, which, from its very nature, must consist in a large degree of mere matter of opinion, and in the same connection makes certain specific statements of fact relating to the same subject which are inconsistent

with the previous general statement, such general statement must be regarded as modified and controlled by the subsequent specific statements." In East v. Detroit Terminal Railroad, 229 Mich. 592, 595, it is said: "The correction of a misstatement or the clarification of ambiguous testimony does not create an issue of fact." And in the recent case of Steinberg v. Builders' Lumber & Trecking Co., decided by the same Michigan court and reported in 212 N. W. Rep. 960, where the question was whether the trial court had erred in directing a verdict for the defendant and it was held that the directed verdict was proper, it is said (p. 961): "Conclusions stated by a witness are eliminated by facts subsequently given by him and inconsistent therewith. * * When a witness makes general statements calling for elucidation by way of specific facts and elucidates, the explanation governs in considering the direction of a verdict."

In the present case, we do not think that the court erred in directing a verdict for defendant, and, accordingly, the judgment against plaintiff is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

with the previous general statement, which merely stated that
 no evidence as to whether the defendant was a member of the
 "Society" or not was presented. The defendant's statement that
 he was a member of the "Society" was not taken into account in
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 into account in the determination of the defendant's guilt.

In the present case, it is not clear that the

defendant is a member of the "Society" or not. The

defendant's

statement that he was a member of the "Society" was not

AGNES SHEKERJIAN,
Appellant,

v.

PAUL SHEKERJIAN,
Appellee.

}
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.
}

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

This appeal is taken from a decree of the Superior court, entered January 27, 1927, wherein the court after a hearing dismissed for want of equity complainant's bill for a separate maintenance. In the litigation defendant filed a cross-bill for a divorce upon the ground of complainant's alleged adultery. This cross-bill also was dismissed for want of equity and the husband perfected a separate appeal (case No. 31900) from that portion of the decree. The two appeals were consolidated for hearing in this appellate court. For the reasons stated in the opinion this day filed in said cause No. 31900, the said decree in its entirety is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

289 - 31900

PAUL SHEKERJIAN,
Cross-complainant and appellant,

v.

AGNES SHEKERJIAN,
Cross-defendant and appellee.

91 - 31699

AGNES SHEKERJIAN,
Complainant and Appellant.

v.

PAUL SHEKERJIAN,
Defendant and Appellee.

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 CONSOLIDATED APPEALS

 FROM SUPERIOR COURT
 OF COOK COUNTY.

MR. JUSTICE CHIDLEY DELIVERED THE OPINION OF THE COURT.

These several appeals, consolidated for hearing, are from a decree of the Superior court of Cook county, entered January 27, 1927, wherein after a hearing the court dismissed complainant's amended bill for separate maintenance, and also dismissed the cross-bill of her husband, Paul Shekerjian, for a divorce on the ground of adultery, both for want of equity. The court found in the decree that complainant had not established by a preponderance of the evidence that she was living separate and apart from her husband without fault on her part; and also found that cross-complainant had not established by a preponderance of the evidence that his wife was guilty of adultery; and also found that a certain Stutz automobile, in the possession of the wife, was her sole and separate property.

Complainant's original bill was filed on August 5, 1926. She therein alleged in substance that the parties were married on March 6, 1916; that for several years they had had their home in Chicago; that there were two minor daughters; that he was engaged

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in the shoe shining and hat cleaning business on West Van Buren street, Chicago, and had a considerable income, owned real and personal estate and had money on deposit in a bank; that he had been guilty of two acts of extreme cruelty towards her (detailing them) on December 25, 1925, and July 30, 1926; and that without fault on her part she was compelled to and did leave him on July 30, 1926. In addition to a separate maintenance, she prayed for temporary alimony, solicitor's fees and the custody of the children. An order was entered allowing her \$50 a week alimony and \$250 for solicitor's fees. In the husband's answer he denied the acts of cruelty or that she was entitled to a separate maintenance. In his cross-bill, filed November 22, 1926, for a divorce and the custody of the children, he alleged in substance that for more than a year prior to July 30, 1926 (date of separation) his wife had refused to cohabit with him; that during the months of December, 1925, and January, February and March, 1926, she had several times, at the family home at 4420 North Paulina street, Chicago, committed adultery with one Leo Vashjian; that about three years prior thereto she also had committed adultery with other parties unknown; and that knowledge of these acts had not come to him until after the filing of her original bill. In her answer to the cross-bill she denied all acts of adultery or that he was entitled to a divorce. On December 15, 1926, he filed a petition alleging that on and prior to July 30, 1926, the family home had been in an apartment in a building owned by him; that on July 30, 1926, because of a controversy which then occurred and because of her "unwifely and highly temperamental conduct" he voluntarily left the home and the children and went to live elsewhere, leaving her in full charge; that the furniture in the house belongs to him and that she is endeavoring to sell some of it; and that he left in the garage a new, 1926,

Stutz automobile, costing \$3375, most of which cost he had paid, and that she is threatening to dispose of it. In accordance with the prayer of the petition the court issued an injunctive order, restraining her from selling or disposing of the automobile or any other personal property in the home until further order. On December 23, 1926, she filed an amended bill for separate maintenance, etc., making substantially the same allegations as in the original bill, but further alleging that during the years 1925 and 1926, her husband had "committed adultery with various vile and lewd women, whose names are unknown." His answer to the amended bill denied the cruelty and adultery charges or that she was entitled to a separate maintenance.

On the hearing in open court a mass of oral and documentary evidence was introduced by both parties. After reviewing the same it seems clear to us that, as found by the chancellor, complainant did not establish by a preponderance of the evidence that she was living separate and apart from her husband without fault on her part or that she was entitled to a separate maintenance. Indeed the points made in her counsel's brief, supported by his printed argument, relate solely to the question whether she had committed adultery as charged in her husband's cross-bill. And she utterly failed to prove the charge of his adultery as contained in her amended bill.

As to her adultery with Lee Tashjian, as charged in the cross-bill, the evidence is conflicting. As to her claimed prior acts of adultery with other unknown parties, while there are circumstances possibly warranting suspicions, the evidence does not warrant the conclusion that she committed any such acts. We shall briefly discuss the evidence bearing upon the charges that she at various times committed adultery with Tashjian.

The only testimony contained in the record to sustain these charges is that of Tashjian himself, and it is not corroborated.

There is no doubt, however, that the fact of the matter is that

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denied
Mrs. Shakerjian/them on the stand. In the summer of 1925, when he was about 19 or 20 years of age, he came to Chicago, seeking employment, and he obtained a position as a "counter man" in a restaurant on West Van Buren street, next door to the store in which Paul Shakerjian conducted his business. He and Paul became friends. In October, 1925, in his store, Paul introduced his wife to him and in November Paul invited him several times to dinner at his home at which dinners Mrs. Shakerjian and the children were present. He further testified that one afternoon, later in November, in response to Mrs. Shakerjian's telephone call, he went to her home and at her solicitations had sexual intercourse with her; and that on four or five other occasions at the home during December, 1925, and January, 1926, he had other such intercourse with her. In March or April he ceased working at the restaurant, obtained employment elsewhere, and, finally, left Chicago in July, 1926, returning to his former home in Providence, R. I., where he has since resided. Paul Shakerjian testified that he never suspected that there had been anything wrong in the relations between his wife and Tashjian until after she had filed her bill for separate maintenance; that then he "heard some things;" and that afterwards he went east and traced Tashjian to Providence and there had an interview with him. Tashjian further testified that he never told anyone about his improper relations with Mrs. Shakerjian until the interview he had with Paul in Providence about one month before the trial; that at the interview Paul expressed his suspicions and, thereupon, he told Paul "the whole thing," explaining to him "in detail just as I have in court here;" and that he agreed with Paul that he would come to Chicago when the case was called for trial and give his testimony.

It is evident from the decree and from the oral opinion of the chancellor, delivered on January 13, 1927, after the hearing, that he did not believe Tashjian's testimony. He was

better able to judge concerning the credibility thereof than is this reviewing court, for he saw the witness and observed his demeanor on the stand. He stated in the opinion: "Now, this man, before he can be believed, needs the strongest corroboration. There is no proof of any other act of adultery. * * I would not brand this woman as an adulteress upon the uncorroborated testimony of this man." After considering the evidence, and the circumstances in evidence, we do not think that the chancellor's conclusions or the decree should be disturbed. It is said in Wahlev. Wahle, 71 Ill. 810, 814: "The evidence of a particeps criminis in adultery is, at best, liable to grave suspicion." (See, also, 2 Bishop on Marriage & Divorce, Chap. XLII, Page 542, par. 1419.)

Accordingly, the decree of the Superior court of January 27, 1927, is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

Before this is fully examined, the following should be
 said regarding the fact, for in the first and second
 documents on the point. He stated in the second "I was not
 before me and he believed, under the strongest conviction,
 there is no proof of any kind of conspiracy. I would not
 have said so as an individual when the circumstances
 surrounding the case were. After examining the evidence, and the
 circumstances in evidence, we do not think that the conspiracy
 mentioned in the second document. It is not an
 official conspiracy, but a private one. The evidence of a conspiracy
 against the country is not good. There is no evidence
 (see also a letter on this subject, dated 18th, 1897)

Respectfully, the desire of the President is to

January 27, 1897. is at home.

Yours,

Wm. H. Taft, and family. 4, 1897.

136 - 31746

BERTHA WEISSMAN,
Appellee,

v.

DAVID WEISSMAN,
Appellant.APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On July 23, 1926, complainant filed her bill against defendant, her husband, for a separate maintenance. She alleged that on July 8, 1926, she was compelled to leave him without fault on her part and because of certain acts of cruelty set forth in detail, and that she is now living separate and apart from him; that they have one child - a son named Richard, aged 9 years; that defendant is possessed of real estate of the value of about \$8,000, and of personal estate of the value of about \$4,000, that he is deriving an income from the practice of his profession as a physician and surgeon of about \$7,000 per year, and that complainant has neither property nor income of her own. Defendant filed an answer to the bill in which he denied all the allegations as to her right to a separate maintenance and as to the amount of his property and his yearly income.

On September 24, 1926, on complainant's motion for temporary alimony, and after hearing evidence and arguments of counsel, the court ordered that defendant pay her \$40 per week, until further order, as temporary alimony for her support and that of the child, the first installment to be paid on September 30, 1926. From this order defendant perfected the present appeal. No brief by appellee has been filed in this court.

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No findings of fact appear in the court's order of September 24, 1926, and no certificate of evidence is contained in the transcript. The order, therefore, is without support in the record and for that reason must be reversed. It is well settled that to sustain such an order in a reviewing court, either the order itself must contain recitals of ultimate facts sufficient to sustain it, or evidence to sustain it must appear in the record by certificate of evidence. (French v. French, 302 Ill. 182, 188; Edlund v. Edlund, 209 Ill. App. 512; Boucsek v. Boucek, 228 Ill. App. 206, 207.)

Accordingly, the order is reversed.

REVERSED.

Barnes, P. J., and Scanlan, J., concur.

266 - 31877

HENRY NEWMAN,
Appellee,

v.

ABRAHAM SCHATZ and
BARAH SCHATZ,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIBBLEY DELIVERED THE OPINION OF THE COURT.

In an action to recover back \$1,000, paid as earnest money by plaintiff under the provisions of a written contract for the purchase of certain Chicago real estate, the court, at the conclusion of all the evidence, directed the jury to find the issues in his favor and to assess his damages at \$1,000. The jury returned such verdict, and on October 19, 1926, judgment in that sum was entered against defendants, and they appealed. It is here urged that the court's action in directing a verdict for plaintiff was erroneous.

Plaintiff introduced in evidence the contract and certain other writings, and he and four other witnesses called by him testified. Abraham Schatz, one of the defendants, also testified, as did three other witnesses for them.

By the terms of the contract, executed on June 25, 1924, plaintiff agreed to purchase of defendants, at the price of \$61,000, certain real estate, described as the "southwest corner of Ainslie and Hamlin Aves., on lot 97-1/2 x 125, part of same improved with a three-story brick, steam heated apartment building," etc. Schatz and his wife (defendants) agreed to sell the premises at said price and "to convey to the purchaser a good and merchantable title thereto, by their general warranty deed," subject to existing leases, taxes, etc., and "also subject to a first incumbrance of \$33,500,

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1. The first witness was the defendant, who testified that he had been in the company of the defendant at the time of the murder.

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due in November, 1926," payable in certain mentioned installments. It is further stated that "said purchaser has paid \$1,000, as earnest money, to be applied on such purchase when consummated, and agrees to pay, within 5 days after the title has been examined and found good or accepted by him, * * the further sum of \$26,500, at the office of Bellins & Collins, * * provided a good and sufficient warranty deed, conveying to said purchaser a good and merchantable title to said premises, subject as aforesaid, shall then be ready for delivery." It is further provided, as regards the payment of said balance of \$26,500, that "a Certificate of Title issued by the Registrar of Titles of Cook County, or complete merchantable Abstract of Title or merchantable copy brought down to date hereof, or merchantable Title Warranty Policy made by Chicago Title & Trust Co., shall be furnished by the vendor within a reasonable time;" that, if an abstract be furnished, the purchaser or his attorney shall within 10 days deliver to the vendor or his agent a memorandum in writing, specifying his objections, if any, to the title; that "in case material defects be found in said title, and so reported, then, if such defects be not cured within 60 days after such notice thereof, this contract shall, at the purchaser's option, become absolutely null and void, and said earnest money shall be returned; notice of such election to be given to the vendor; * * ." It is further provided that "this contract and said earnest money shall be held by Collins & Collins for the mutual benefit of the parties concerned." Below the signatures is the statement, signed by Collins & Collins: "Received \$1,000 earnest money which by agreement is endorsed over to sellers."

The following Undisputed facts appear: After the making of the contract the land was surveyed by a licensed surveyor and he reported that the frontage on Hamlin avenue measured slightly less than 94-1/2 feet, instead of 97-1/2 feet as stated in the contract,

although the depth was a few feet more than 125 feet. Defendants, by their attorney, Samuel Keeningsberg, made application to the Chicago Title & Trust Co. for the issuance of an owner's guaranty policy, and on July 21, 1924, that company delivered to Keeningsberg its written opinion, stating the result of its examination of the title to the premises as of July 8, 1924. In this opinion it is stated that the company finds the title of record to be in said Schatz and wife in joint tenancy, but subject to 14 stated items. The first mortgage, as mentioned in the contract, is set forth in item No. 5. Items Nos. 6 and 7 state that the property is also subject to two other mortgages in considerable amounts, and item No. 11 states that certain notes previously given by Schatz and wife, and secured by still another mortgage (presumably paid) should be produced and cancelled. On July 25, 1924, Keeningsberg sent to Joseph Reznick, plaintiff's attorney, a letter, in which was enclosed said opinion of title, and in which he wrote: "Objections Nos. 6, 7 and 11 in said opinion will be taken care of at the close of this deal; please arrange the time and place when the deal can be closed." Thereafter various negotiations, as shown by the testimony, were had between the two attorneys representing the respective parties and there were conferences between plaintiff and Abraham Schatz. On August 12, 1924, Reznick, plaintiff's attorney, wrote Keeningsberg in part as follows: "I have submitted to Mr. Newman the proposal you made for a reduction of \$200 in the purchase price by reason of the discrepancy of 3 feet in the frontage of the premises. The proposition is not acceptable to Mr. Newman. He insists upon strict compliance on the part of your clients with the provisions of the written contract * * and has directed me to notify you that unless your clients deliver the real estate with a frontage of 97-1/2 feet, as per contract, he does not intend to consummate the deal. Furthermore, * * he demands that the second and third mortgages be released of

record before the closing of the deal; that the objections shown in the opinion of title by the Chicago Title & Trust Co. be removed and that the contract be complied with in every detail." Thereafter further negotiations were had. Defendants either could not or would not arrange for the delivery of a deed conveying to plaintiff a frontage on Hamlin avenue of 97-1/2 feet, instead of a frontage of about 94-1/2 feet, and refused to pay and satisfy said second and third mortgages before plaintiff paid the balance on the purchase price of \$26,500, or to tender to plaintiff a deed of the property subject only to a first mortgage incumbrance of \$33,500, as stipulated in the contract. They took the position that, as the amounts of the second and third mortgages aggregated considerably less than \$26,500, they would pay and satisfy them after plaintiff had paid said balance of \$26,500 and not before.

Because of these undisputed facts we think that plaintiff was fully justified in refusing to consummate the purchase and in demanding of defendants the return of the \$1,000, earnest money, which he did before commencing the present action. Defendants, in the two particulars mentioned, either were unable or refused to carry out the terms of the contract, without fault on plaintiff's part, and, under the circumstances and by the express terms of the contract, plaintiff became entitled to have the \$1,000 returned to him. And we think that the court was fully warranted in directing the verdict as returned and in entering the judgment appealed from. Reference may be made to the following cases as sustaining these views: Conway v. Case, 23 Ill. 127, 138; Head v. Altgeld, 136 id. 298, 304; Lancaster v. Roberts, 144 id. 213, 224; Eagers v. Busch, 154 id. 604, 607; Weiss v. Glamitz, 203 Ill. App. 246, 247; Blunt v. Kelly, 219 id. 327, 332.

We cannot say, however, that the present appeal was prosecuted solely for delay, and that statutory damages should be added to the amount of the judgment as urged by plaintiff's counsel.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

272 - 31883

ABNER M. AARON, for use of
GREENFIELD-SHERMAN CO.,
Appellee,

v.

ROLL-A-WAY BED CORPORATION,
a corporation, garnishee,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 19, 1926, the Greenfield-Sherman Co. obtained a judgment by confession on a lease against Abner M. Aaron for \$143.59. On December 10, 1926, it instituted a garnishment proceeding against the Roll-a-way Bed Corporation, garnishee. Aaron was an employee of that corporation. The demands mentioned in section 14 of the Garnishment Act were served upon Aaron and the corporation more than 24 hours before the garnishment proceeding was begun. The writ was served on the garnishee on December 13th. It filed a verified answer on December 16th, stating that it did not have in its possession or control any goods, effects, moneys or credits of said Aaron, either at the time of the service of said demand or the writ upon it. The answer was contested. On January 13, 1927, there was a trial without a jury, resulting in the court finding the issues against the garnishee and that it owed Aaron, for use, etc., the sum of \$60. Judgment was entered on the finding against the garnishee and it appealed.

J. F. Peace, bookkeeper and accountant for defendant and called by plaintiff, was the only witness. He testified in substance that Aaron was in the employ of defendant, selling beds; that defendant was accustomed to pay him \$60 every week as an "advance", or on a "drawing account," on commissions for

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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beds sold or to be sold by him; that defendant was served with the demand on December 9, 1926, and Aaron's next pay day was December 11th; that because of the service of the demand defendant did not pay him the usual \$60 on December 11th, but "passed up that week," and that defendant would have made the payment but for the garnishment demand; that on December 11th he was owing defendant on his account with it because his earned commissions did not equal the prior weekly advances; that the same situation existed when the garnishment writ was served on December 13th, but on December 18th defendant paid to Aaron \$60, as usual, for the week from December 11th to December 18th; that Aaron had no written contract of employment with defendant, but the weekly advances to him were regulated according to the business he did in selling beds; and that, as to the \$60 which accrued on December 11th, defendant has not applied the same to any indebtedness which it claimed Aaron owed it.

We concur in the opinion expressed by the trial court, after said witness had given his testimony, viz, that the arrangement between defendant and Aaron, as disclosed, amounted to the same thing as paying him a weekly salary of \$60. And we think that the finding and judgment against the garnishee were fully sustained by the evidence. It sufficiently appears that at the time of the service of the garnishment writ on December 13, 1926, there was due and owing from the garnishee to Aaron the sum of \$60, as and for a weekly salary, which had accrued and was payable on December 11th. There was no evidence that Aaron was the head of a family, residing with the same, or that, after the demand was served upon him, he made and delivered to defendant any affidavit that he was the head of a family, etc., as provided in said section 14 of the Garnishment Act, and, hence, there is no question as to \$15 of said weekly salary being exempt.

Accordingly, the judgment of the Municipal court will be affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

281 - 31892

MADLINE S. STOUT,
Appellee.

v.

ERIC S. ENTERLUND,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERS THE OPINION OF THE COURT.

On October 22, 1926, plaintiff commenced a forcible detainer proceeding against defendant. In her complaint, as amended, she alleged that she is entitled to the possession of the "South 10 feet of Lot 9 of Block 31 of Touhy & Rogers' addition to Ravenswood * ", otherwise known as 4514 Greenview avenue, Chicago, Illinois," and that defendant unlawfully withholds the possession from her. At the conclusion of the trial, had in November, 1926, and during which both plaintiff and defendant testified, the court directed a verdict in plaintiff's favor, and, upon such verdict being returned, entered judgment that she recover possession of the premises, described in the complaint and "known as 4514 Greenview ave.," and that a writ of restitution issue.

Plaintiff introduced in evidence a photographic copy of a warranty deed, dated and acknowledged July 31, 1921, recorded July 22, 1921, wherein Robert A. Scholz, a bachelor, and Rose H. Welch and wife, in consideration of \$27,430, conveyed to her (Madeline Storch Stout) "the south ten (10) feet of lot nine (9) in block thirty one (31)" in said Touhy & Rogers' addition; "also lot seven (7) in Gardner's resubdivision of lots ten (10), eleven (11) and twelve (12) in block thirty-one (31)" in said

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From: W.L.Hart@hawaii.edu Date: 2006-09-20 09:00:00

Touhy & Rogers' addition; "also an easement appurtenant to lot seven (7), according to a plat of said Gardner's resubdivision, recorded December 25, 1904, as document No. 3637316." She did not introduce any evidence showing from whom the grantors in the deed had acquired their title to the premises. She testified on direct examination that when she received the deed there was a six-flat building on the property, "known as 4510-4512 Greenview avenue, Chicago;" that Greenview avenue is a north and south street and that the building was on the west side thereof, facing east; that she took possession of the property and building by virtue of the deed in July, 1921, and remained in continuous possession thereof until March, 1923, when she sold and conveyed the building and said lot seven (7) (but not the south ten feet of lot nine) to Mrs. Emma Gafmeyer; and that shortly after plaintiff took possession she "had a new fence put up in the rear of the lot and the front fence repaired, and put up some cedar posts on the dividing line." On cross-examination her testimony was very conflicting as to where she had erected the "four or five posts." She testified that the depth of the land, from street to alley, was 160 feet. After stating that north of the posts was a three-flat building and that south of the posts was her purchased six-flat building, and that the posts "reached from the fence at the alley almost to the building," she stated that she erected them "on the dividing line between 4512 and 4514," and "for the purpose of dividing my lot from 4512," but she afterwards stated that they were erected "between 4510 and 4512." She was positive that the six-flat building was at 4510-4512 Greenview avenue and that the building was on said "lot seven (7)" and that there was a vacant space, about 10 feet in width, north of the six-flat building and that this was "known as 4514 Greenview avenue," and she

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intimated that No. 4514 corresponded with the "south ten (10) feet of lot 9," but she did not introduce any map or instrument showing the relation of the street numbers to the lot numbers. Nor did she testify how long the cedar posts, which she claimed to have erected, remained, nor that they were still there when she made the conveyance to Mrs. Cafmeyer.

Plaintiff also introduced a photographic copy of her warranty deed (her husband joining therein), dated and recorded on March 6, 1923, wherein she conveyed to Emma Cafmeyer "lot seven (7)" in said Gardner's resubdivision of lots 10, 11 and 12, in said Tenky's & Rogers' addition, "otherwise known as the premises located at Number 4510-12 Greenview avenue, together with all improvements thereon," subject to two trust deeds, one of which is stated to be dated July 21, 1921, "made by said grantors to the Chicago Title & Trust Co. * * to secure their note for \$12,000 due three years after date." She further testified that, at the time she made this conveyance, Mrs. Cafmeyer assumed the payment of the \$12,000 mortgage. She was asked on cross-examination if the mortgage, which Mrs. Cafmeyer had assumed, "covered both Lot 7 and the south 10 feet of lot 9," but, upon objection, the court would not allow defendant to pursue this line of examination. She further testified that Mrs. Cafmeyer took possession of the six-flat building and that thereafter and until about a month after defendant took possession thereof, in April, 1925, she remained a tenant in the building, paying rent. She also introduced in evidence a photographic copy of a warranty deed, dated April 10, 1925, recorded April 13, 1925, wherein Nels Nyden, a widower, conveyed to Eric G. Letterlund (defendant) "lot seven (7)" in said resubdivision, and "also easement for right of way contained in instrument recorded as document No. 3637316." It is

stated in the deed that the conveyance is made "subject to a trust deed, dated July 8, 1924, giving to J. H. Muhn, trustee, * * securing payment of notes aggregating \$18,000." No mention is made as to either of the trust deeds referred to in plaintiff's deed to Mrs. Cafmeyer. Plaintiff did not introduce any evidence showing from whom Nels Syden had acquired title to the property he conveyed to defendant, whether from Mrs. Cafmeyer or from a stranger not her grantee. She further testified that in April, 1925, Zetterlund took possession of the six-flat building and also of the "ten foot strip" to the north thereof, and, as she and her husband were tenants of some rooms in the building, she afterwards paid him rent therefor; that subsequently a dispute arose as to the amount of rent she should pay and, in May or June, 1925, she and her husband ceased being tenants and moved away from the premises; that, after they left, Zetterlund commenced erecting a garage in the rear of the building, which garage "extended across" the ten foot strip; that she first learned that the garage had been erected in September, 1926 (more than a year after she left the premises); and that from the time she received the deed from Scholz and the Welchs in July, 1921, conveying to her the building and the land, including the ten foot strip, she had not sold or conveyed to anyone said strip, "known as 4514 Greenview Avenue," and had not authorized anyone to enter into the possession of the same.

She further testified that on October 7, 1926, she caused her husband, an attorney at law, to write a letter to Zetterlund for her, and that she followed this by serving upon Zetterlund a written demand, in the usual form, demanding immediate possession of said ten foot strip, describing it as the "South ten (10) feet of lot 9, block 31," etc., "otherwise known as 4514 Greenview Avenue, Chicago." In apt time after this demand,

she commenced the present action. The letter referred to was introduced in evidence without objection, and is as follows:

"I notice that you are trespassing on the vacant lot, owned by Mrs. Madeline Stout, at 4514 Greenview avenue, adjoining your flat building on 4510-4512 Greenview avenue. You have put a garage on the rear of the lot and I shall expect you to pay Mrs. Stout for the use of her property. You have also stored an auto-truck on the front of the lot. Since these acts were trespass you must remove your property from the lot at once. You are hereby notified to remove your property from said lot and to refrain from using the lot further without first applying for the privilege and obtaining it. This lot is on the market and, if you desire to buy it, I shall advise Mrs. Stout to sell it at the market price per foot for ground in that neighborhood."

At the conclusion of plaintiff's evidence, and after defendant's motion for a directed verdict in his favor had been overruled, he was called as a witness in his own behalf and was examined and cross-examined. His testimony was in substance that when, in April, 1925, he took possession of the six-flat building and the premises, there were no posts on any line, but there were posts in the rear of the building which were "clothes line posts used for laundry;" that plaintiff and her husband were then tenants in the building and remained such for about two months, when they left; that before they left, and about three weeks after he had taken possession he commenced the excavating work for the building of a garage at the "rear of the lot" and extending over on the ten foot strip; that after this work had been commenced he had a conversation with plaintiff in the hallway of the building regarding certain rent to be paid to him, which was afterwards received; that there was talk about the garage at the time and her only objection to its erection was that it "was taking the play ground from the kids" and on that account she was going to move; that after she moved out of the building he completed the erection of the garage and that immediately north of it is another garage; and that he did not hear anything more regarding the garage from

plaintiff or her husband from the time they moved away until he received the letter of October 7, 1936, introduced in evidence.

At the conclusion of all the evidence defendant's renewed motion for a directed verdict in his favor was overruled, and the court, on plaintiff's motion, instructed the jury to return a verdict in her favor, as first above mentioned, and afterwards entered the judgment appealed from against defendant.

It is well settled in this state that in actions of forcible entry and detainer, or forcible detainer only, "the title to the premises is not involved, nor can it be inquired into on the trial; that possession, and the right to possession, independent of title, are the only questions involved." (Doty v. Burdick, 88 Ill. 473, 475; Palmer v. Frank, 169 id. 90, 91.) It is also well settled that "the person who is in the actual and peaceable possession of land will be deemed to be rightfully in possession, and the burden of proof is upon him who would dispute that possessory right." (Fitzgerald v. Quinn, 165 Ill. 354, 364; Hammond v. Doty, 184 id. 246, 249); and that "one suing under the Forcible Entry and Detainer Act must show a right of possession in himself, and he cannot rely upon the lack of right in those whom he seeks to dispossess." (Fitzgerald v. Quinn, 165 Ill. 354, 366.)

We think it sufficiently appears from the evidence that, at the time of the commencement of the present action, in October, 1926, the defendant (Letterlund) was in the actual and peaceable possession of the six-flat building, and the land on which it stood, and the ten foot strip of land to the north of it, extending from Greenview avenue west to the alley; that said strip was not, and had not been for several years, vacant and unoccupied land; and that plaintiff relinquished such former possession of the strip as she had had, either in March 1923, when she sold the six-flat building

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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U. S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the American Friends Service Committee in the Philippines.

and that, since the House of Representatives is the only body which can impeach the President, it is the only body which can remove him from office. The House of Representatives is the only body which can remove the President from office. The House of Representatives is the only body which can remove the President from office.

to Mrs. Gafmeyer and attorned to her as a tenant therein, or in May or June, 1925, when she finally moved away from the premises, a month or two after defendant had taken possession of the building and the strip by virtue of the Hyden deed. The evidence does not disclose that, when she moved away from the premises, she did any act showing any intention to reserve in herself the possession of the strip. On the trial, in her endeavor to show a right to possession of the strip, she introduced the deed to her from Scholz and the Welchs as evidencing a paramount title in her to the strip, but she did not show that the grantors had any title to convey.

It was an unconnected deed. As said in Doty v. Burdick, supra, (p. 476) "the mere production of a deed from one person to another does not tend to prove title; it must appear that the grantor had title, before there is proof; hence, in a case requiring proof of title, appellee would have failed." Furthermore, the evidence does not disclose with any degree of certainty that the "south 10 feet of lot 8" (conveyed to her by the Scholz and Welch deed together with said "Lot 7," and which 10 feet she did not convey to Mrs. Gafmeyer) is identical with the 10 foot strip of land in question, or that said strip is identical with "4514 Greenview avenue." The evidence tended to show that No. 4514 would be south of 4510-12, which are admittedly the numbers of the six-flat building.

Under the evidence as contained in the present transcript, and under the authorities above referred to, we are of the opinion that the trial court erred in instructing the jury to return such a verdict as they did in plaintiff's favor, and in entering the judgment for possession against defendant. It may be, as argued by defendant's counsel, that plaintiff's remedy, if any, is by an action of ejectment rather than one in forcible detainer, but we do not now pass upon that question. The judgment of the Municipal court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

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MORRIS FELDMAN, doing business
as M. Feldman & Sons,
Plaintiff and Appellant,

v.

HARRY JACOBS and ALCO SHAPS,
Defendants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MORRIS MANDELWITZ, Garnishee,
Appellee.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 5, 1924, in an action in contract, plaintiff recovered a judgment against said defendants for \$501.90, and execution was returned unsatisfied. In April, 1926, plaintiff by an agent filed an affidavit for a garnishee summons to Morris Mandelowitz to appear on April 29, 1926. He was duly served, but failed to appear, and on that day was defaulted, and a conditional judgment for \$501.90 rendered against him, and a scire facias ordered to issue, which was served commanding him to appear on July 30, 1926. He appeared and was granted certain extensions of time, but finally, failing to appear and defend, the court, on August 31, 1926, defaulted him, and ordered that the conditional judgment be made final. On October 26, 1926, more than 30 days after said final judgment had been entered, he appeared and moved that his default and said judgment be vacated. The motion was supported by his sworn petition, which the court allowed him to file, and thereafter, in compliance with a rule, plaintiff filed an answer thereto. On December 18, 1926, after a hearing, the court ordered that the petition stand as the garnishee's answer, and, after considering it and Mandelowitz's testimony given in open court, further ordered

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THE TREASURER'S ACCOUNT FOR THE YEAR 1911

On the 1st of January, 1911, the balance in the Treasurer's account was \$100.00. During the year, the following amounts were received from the members of the Association: \$100.00. The total amount received was \$100.00. The total amount paid out was \$100.00. The balance on the 1st of January, 1912, was \$100.00.

that he "be and is released and discharged as garnishee," from which order the present appeal is taken. Mandelowitz has neither appeared nor filed a brief in this appellate court.

In the petition Mandelowitz alleged that, complying with the summons, he was present in court on April 29, 1926, from 9:30 to 11:30 a. m.; that "he did not hear the cause called for trial;" that he spoke to the clerk and "was told that he would receive another notice to appear;" that he was again present in court on July 30th, and the cause was called for trial, and he there testified that he was not indebted to Harry Jacobs in any amount, but that on the contrary Jacobs was indebted to him, and that, thereupon, he (affiant) was advised that the cause would be continued to a subsequent date; that he was not represented by an attorney at either of said hearings, that he is not familiar with court procedure, and that he can neither read nor write the English language; that he did not know that a conditional judgment had been rendered against him at said first hearing; that he believed that his testimony given at said second hearing discharged him from any liability, or that the cause had been continued generally and that a new notice would be served upon him; that the first notice he received that final judgment had been rendered against him was on October 15, 1926, when an execution on the judgment was served upon him; that he has a meritorious defense, in that he is not indebted to Harry Jacobs in any amount; that during the past two years, while said Jacobs was unemployed and ill, affiant loaned him various sums of money; and that at the time of the service of the garnishment writ Jacobs was and now is indebted to affiant in the sum of \$350.

In plaintiff's answer to the petition it is stated in substance (1) that the court had no jurisdiction to hear or act upon the petition because it was not filed until more than 30 days after said final judgment was entered, and (2) the petition failed

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to show any diligence on the part of the garnishee.

In section 31 of the Municipal Court Act it is provided that "every judgment, order or decree of said court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court during the term at which the same was rendered in such circuit court, provided, a motion to vacate, set aside or modify the same be entered in said Municipal court within 30 days after the entry of such judgment, order or decree;" and that, if no such motion be entered within that time, the judgment, order or decree "shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal court setting forth grounds for vacating, setting aside or modifying the same which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity, provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion," etc.

In view of this section of the Act and of the allegations of said petition, we are of the opinion that the court was without jurisdiction to set aside the final judgment of August 31, 1926, against him as garnishee, and that the order appealed from is a nullity. (Galley v. Mathis, 195 Ill. App. 170, 171; Price v. Marie, 207 id. 112, 113; American Surety Co. v. Blinn, 214 id. 463, 465.) His motion to vacate the judgment, accompanied by his petition, was not made until more than 30 days after the entry of the judgment. Neither in his petition nor in his testimony before the court does it appear that said judgment was entered because of any errors in fact, which were then unknown to the court and which, if known, would have precluded the entry of the judgment. (Doyle v. Fallowe, 207 Ill. App. 5, 6.) Although in the petition and in his testimony he states

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that when the judgment was entered he was not indebted to Harry Jacobs in any sum and that he has a meritorious defense, etc., neither the petition nor his testimony discloses any facts tending to show that at and prior to the time of the entry of the judgment he exercised proper diligence. On the contrary it clearly appears that he was guilty of negligence in not himself properly attending to the case or employing an attorney to do so for him. And, hence, he makes no showing such as would entitle him to have the judgment vacated by a bill in equity. "It is well settled that equity will not interfere with the enforcement of a judgment at law, unless the judgment debtor could not have availed himself of his defense at law, or was prevented from so doing by the fraud of the opposite party, or by accident or mistake unmixed with fault or negligence on his own part." (Bardonaki v. Bardonaki, 144 Ill. 284, 289; American Surety Co. v. Elias, 214 Ill. App. 463, 467.)

Accordingly the order of the Municipal court of December 18, 1926, appealed from, is reversed. This leaves the final judgment of August 31, 1926, against Mandelowitz, the garnishee, for \$501.90, standing in full force and effect.

REVEREND.

Barnes, P. J., and Scanlan, J., concur.

that when the judgment was entered he was not intended to deny
 Justice in any way but that he was a conscientious citizen, etc.,
 neither had Justice any ill-will, friendship nor family feeling
 to him that he was aware of the fact of the entry of the judgment
 he conceived proper allegiance. He the contrary is clearly apparent
 that he was guilty of negligence in not himself personally attending
 to the case or engaging an attorney to do so for him. With respect
 to Justice he showed such an entire lack of regard for the judgment
 rendered by a bill in equity. It is well settled that equity will
 not interfere with the enforcement of a judgment at law, unless
 the judgment itself was not duly entered or the rights
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 being, or of failure to enforce judgment with intent to defraud.
 as his own party. Johnson v. Johnson, 100 Ill. 407, 408.
Johnson v. Johnson, 7 Ill. 407, 408, 409, 410.
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Justice, J. J., and Justice, J. J., Justice.

315 - 31928

JOHN O. CARLSON,
Appellee,

v.

FRANK J. O'DONNELL,
Appellant.APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit, commenced June 12, 1926, the court, after a trial without a jury, found the issues for plaintiff, assessed the damages at \$2759.81, and entered judgment on the finding against defendant, and he appealed.

In plaintiff's statement of claim it is alleged that "as an incident to the consummation of a written contract (dated July 31, 1925) for the exchange of properties between the parties," they, on August 7, 1925, entered into another written contract whereby it was agreed that, because it then was impossible for the parties to determine the exact amount of the 1925 general taxes on the two properties for the purpose of prorating the same as provided in the first contract, said prorating "was to be made upon the basis of the valuations of the respective buildings and lands of plaintiff and defendant as then fixed and given out by the Board of Assessors," and that, in case the valuations be increased or reduced by the Board of Assessors, or the Board of Review (whereby the 1925 taxes are increased or reduced from the figures used in connection with the consummation of the first contract), then and in that event "a re-adjustment of the figures pertaining to the prorating of taxes shall be made on the basis of the figures which shall be used in connection with the issuance of tax bills for

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UNITED STATES DEPARTMENT OF JUSTICE

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1925, when the bills shall have been received," and that "any deficiency or credit shall be made up and paid by the party affected at that time."

It appears that the contract of July 31, 1925, for the exchange of the properties was consummated about August 3, 1925, after the making of the written contract sued upon, that defendant's property, which was transferred to plaintiff, was an apartment building, located on the northeast corner of Sheridan road and Lunt avenue, Chicago, (hereinafter referred to as the Sheridan road property); and that plaintiff's property, which was transferred to defendant, was also an apartment building, located at Nos. 2339-38 North Spaulding avenue, Chicago (hereinafter referred to as the Spaulding avenue property.)

It is further alleged in plaintiff's statement of claim that, in the consummation of the exchange of the properties, the 1925 taxes on defendant's Sheridan road property (transferred to plaintiff) were figured on the assessed valuation (including land and building) of \$124,500, and at the 1924 tax rate of 3.29, amounting to a total tax of \$5,326.33, and in the prorating thereof defendant was charged \$3225.38 for the pro rata portion from January 1 to August 3, 1925; and that the 1925 taxes on plaintiff's Spaulding avenue property (transferred to defendant) were figured on the assessed valuation of \$100,726, and at the 1924 tax rate of 3.11, amounting to a total tax of \$4624.44, and in the pro-rating thereof plaintiff was charged \$2,473.31, for the pro-rata portion from January 1 to August 3, 1925.

It is further alleged that, after the execution of the contract of August 7, 1925, and after the properties had been exchanged, the assessed valuation of the Sheridan road property was increased by the Board of Review to \$128,500 (an increase of \$40,000), and the

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assessed valuation of the Spaulding avenue property was reduced by the Board of Assessors to \$80,726 (a reduction of \$80,000); that when the bills for the 1925 taxes on the properties were received the total amount of the tax bill on the Sheridan road property was \$7371.59, and the pro rata portion chargeable to defendant is \$4464.09, and the total amount of the tax bill on the Spaulding avenue property was \$2,324.36, and the pro-rata portion chargeable to plaintiff is \$1346.96; that by reason of said increase in said taxes on the Sheridan road property defendant owes to plaintiff the difference between \$4,464.09 and \$3225.36, or the sum of \$1238.71; and that by reason of the decrease in said taxes on the Spaulding avenue property defendant owes to plaintiff the difference between \$2475.31 and \$1346.96, or the sum of \$1126.35.

It is further alleged that, in the procurement of the reduction of the taxes on the Spaulding avenue property, "plaintiff obligated himself to pay and did pay the sum of \$1000 for services rendered, and defendant undertook and promised to reimburse plaintiff for the pro-rata portion thereof, as it affected the amount of the tax from August 3 to December 31, 1925, for which defendant would receive the benefit, and that by reason whereof, defendant owes the plaintiff the sum of \$594.45."

It is further alleged that plaintiff's total claim of \$3759.51, is made up of said three sums of \$1238.71, \$1126.35 and \$594.45, and that demands for the payment of the aggregate sum have frequently been made of defendant, but that he has refused to pay the same or any part thereof, etc.

In defendant's affidavit of merits he did not deny the execution of the two contracts of July 31, 1925 and August 7, 1925, or that the exchange of the properties had been consummated, or that the 1925 taxes on the Sheridan road property had been increased

as alleged, or that the 1925 taxes on the Spaulding avenue property had been decreased as alleged. Nor did defendant question in any way plaintiff's figures as stated. Two defenses, and only two, were made to plaintiff's claim, viz (1) that the agreement of August 7, 1925 was "without any consideration," and that defendant received nothing from plaintiff for signing it either in money or anything of value, and that, hence, "he was not indebted to plaintiff in any sum whatsoever because of the increase or decrease in tax valuations of said properties," and (2) that defendant never promised to pay any sum to plaintiff for having any taxes reduced, that the reduction, if any, obtained on the 1925 taxes on the Spaulding avenue property was brought about through the voluntary efforts of plaintiff or his agents without defendant's knowledge, and that, therefore, he was not indebted to plaintiff in the sum of \$394.45, or any other sum, for having said taxes reduced. No allegation is made, nor is there even a suggestion, that plaintiff, in procuring by himself or through agents the reduction of said taxes, did any illegal acts, such as under the authorities might militate, upon the grounds of public policy, against his recovering anything under the terms of said contract of August 7, 1925, or defendant's said oral promise as alleged.

The cause came on for trial upon the issues as framed by the pleadings, and much oral and documentary evidence was introduced, including the two contracts of July 21, 1925, and August 7, 1925. Plaintiff was a witness in his own behalf and his attorney, LeRoy Penwell, testified for him. Plaintiff also called the defendant as a witness under section 35 of the Municipal Court Act. Defendant also testified in his own behalf and he called as a witness Marvin F. Bates, who acted as plaintiff's agent in the negotiations which preceded the obtaining of the reduction in the 1925 taxes on the

The first case in the trial was the failure to inform the
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Spaulding avenue property. Much of the evidence admitted during the trial was, in our opinion, immaterial as to the issues as framed, and it will serve no useful purpose to discuss it. Suffice it to say that we are of the opinion, after review, that the court's finding and judgment are amply sustained by competent evidence on the questions whether there was a sufficient consideration for the agreement of August 7, 1925, and whether defendant orally had promised to pay his pro rata share of the proper costs and expenses in plaintiff's endeavors through an agent in bringing about a reduction on the 1925 taxes on the Spaulding avenue property, and whether the sum of \$394.45 was defendant's proper share of said cost and expense.

The main points argued by defendant's counsel in their brief, as grounds for a reversal of the judgment, are that "the contracts sued on are against public policy and void," and that, "when a contract is against public policy the court will so adjudge it, although the defendant has not raised the defense of illegality by his pleadings." In support of these points counsel cite the case of Grichfield v. Bermudez Paving Co., 174 Ill. 466, and other cases. Plaintiff's counsel does not dispute the principles as enunciated in these cases, but contends that they are not applicable to the facts of the present case. With this contention we agree. After reviewing the evidence and the discussion of portions thereof by respective counsel we find nothing in the contracts, or in the actions of either of the parties in connection therewith, as would justify the holding that public policy forbids any recovery by plaintiff in the present action.

The judgment of the Municipal court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, F. J., and Scanlan, J., concur.

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423 - 31555

LINCOLN BROOKE,
Appellee,

v.

CHARLES H. SCHWEPPE,
BARRETT WENDSELL, Jr.,
and WILLIAM MCCORMICK BLAIR,
copartners doing business
under the name and style of
Lee, Higginson & Company,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, before a court and jury, the appellee, Lincoln Brooke, hereinafter referred to as the plaintiff, obtained a verdict against the appellants, Charles H. Schweppe, Barrett Wendell, Jr., and William McCormick Blair, copartners doing business under the name and style of Lee, Higginson & Company, hereinafter referred to as the defendants, in the sum of \$57,507.31. Judgment was entered on the verdict and this appeal followed.

The suit was in assumpsit and the declaration consisted of one special count.

The defendants were engaged in the business of buying and selling bonds and other securities. The plaintiff had been a customer of the defendants for some time prior to the transactions complained of in the declaration. He had a charge account with them, and in November, 1917, he signed and turned over to the defendants a collateral agreement in the usual form. The defendants would buy and sell securities at the order of the plaintiff and until February, 1920, sufficient securities were always left as collateral with the defendants to protect the

LETTERS TO THE EDITOR

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account. It appears that a serious depression in the securities market commenced in December, 1919, and that it continued for a period of about two years. In February, 1920, the defendants called upon the plaintiff to furnish additional collateral. The plaintiff failed to put up any and some time thereafter the defendants commenced to sell the securities that were then in their hands to protect the account with the plaintiff. The selling started in July, 1920, and was finished in April, 1922, when the account was closed out and the plaintiff was given a check for \$173.60 and securities of the value of about \$3000.

The plaintiff claims that he had an oral agreement with the defendants that if at any time additional securities should be required by the defendants and he was unable to furnish the same that he could deposit with the defendants as additional security his promissory note for such an amount as they should require, and to secure the note he should execute and deliver a trust deed upon certain lands in Iowa and Wisconsin belonging to the plaintiff, with such person as trustee as they should determine, and that the defendants agreed that when such note and trust deed should be delivered to them that they would never sell any of the securities left with them by the plaintiff so long as he should pay interest on all moneys owing to the defendants. The plaintiff further claims that when he was called upon for additional securities in February, 1920, he offered to give the defendants his promissory note for such an amount as they should require and secure the note by a trust deed to such person as trustee as they should name and upon such portion of his real estate as the defendants should determine; that the defendants at first agreed to accept his offer but that later they refused it, and the plaintiff further claims that the selling of his securities by the defendants, under the circumstances, was in

violation of the agreement, he had with them, and over his protest.

The defendants contend that not only is the verdict of the jury manifestly against the weight of the evidence but that the clear preponderance of the evidence is with the defendants.

Saves as to the question of damages, the only testimony offered in support of plaintiff's case was that of the plaintiff. This testimony made out a prima facie case. The defendants contended that the testimony of the plaintiff in reference to the alleged note and real estate security was false in toto; that no such agreement was ever made or contemplated by the parties, and in support of their theory of fact they introduced three witnesses whose testimony completely contradicts that of the plaintiff relating to the said agreement and the circumstances, conversations and acts in reference thereto. Two of these witnesses were employees of the defendants; one of them, Mr. White, was an employee at the time of the alleged transaction, but at the time of the trial was the vice-president of the National Bank of the Republic.

On this important and controlling issue, as to whether there was such an agreement between the parties, we have made an exhaustive study of the evidence, and loath as we are to disturb the verdict of the jury on any question of fact, nevertheless, we find ourselves convinced from the record that the present contention of the defendants is well founded. The fact that the defendants introduced the greater number of witnesses has not alone controlled our judgment in this matter, for the entire res gestae surrounding the alleged agreement, in our opinion, tends very strongly to impeach the testimony of the plaintiff in reference thereto.

For the reason that this case may be tried again, we refrain from analyzing and commenting upon the evidence in detail.

violation of the agreement he had with them, and over his protest.

The defendant's content that not only is the verdict of the jury manifestly against the weight of the evidence but that the clear preponderance of the evidence is with the defendant.

Save as to the question of damages, the only testimony offered in support of plaintiff's case was that of the plaintiff.

This testimony was not a direct testimony. The defendant contended that the testimony of the plaintiff in reference to the alleged note and real estate security was taken in hearsay; that no such agreement was ever made or contemplated by the parties, and in support of their theory of fact they introduced three witnesses whose testimony completely contradicted that of the plaintiff relating to the said agreement and the circumstances, nonrecognition and acts in reference thereto. Two of these witnesses were employees of the defendant; one of them, Mr. Wright, was an employee at the time of the alleged transaction, and at the time of the trial was the vice-president of the National Bank of the Republic.

On this important and controlling issue, as to whether there was such an agreement between the parties, we have made an exhaustive study of the evidence, and find as we are to announce the verdict of the jury on any question of fact, nevertheless, we find ourselves convinced from the record that the preponderance of the evidence is well founded. The fact that the defendant introduced the greater number of witnesses has not alone controlled our judgment in this matter, for the entire weight bearing surrounding the alleged agreement, in our opinion, tends very strongly to impeach the testimony of the plaintiff in reference thereto.

For the reason that this case may be tried again, we refrain from analyzing and commenting upon the evidence in detail.

We feel impelled, however, to note the fact that the record shows that the trial judge stated to the lawyers during the hearing of the cause that the evidence of the plaintiff in reference to the agreement was, in his judgment, incredible.

The defendants contend that there is a fatal variance between the cause of action alleged in the declaration and the proof offered to sustain the same. That there are variances between certain of the allegations of the declaration and the proof must be conceded, but we are not satisfied that the allegations and the proof do not correspond substantially. In actions upon contracts the rule is thus stated in Wheeler v. Reed, 36 Ill. 81, 88:

"That if any part of the contract proved varies materially from that which is stated in the pleadings it will be fatal, a contract being an entire thing and indivisible; and where a plaintiff declares upon a special contract, the proof and the allegations must correspond, not, as he contends, precisely, but substantially. A variance is understood to be a substantial departure from the issue in the evidence adduced, and must be in some matter which, in point of law, is essential to the charge or claim. Stephen on Pl., 187, 198; 1 Greenl. on Ev. 79. And the reason is, that the defendant may not be subject to another action and recovery for the same cause set out with more certainty and particularity in another suit. If this defendant could protect himself by this judgment and recovery, if the same rights should come again in controversy, the demand of this rule of law is fully answered. * * * A party is not compelled to follow the precise form of words in which the contract was made; it suffices if he state its true legal effect and operation; and this applies to verbal as well as to written contracts. 1 Chit. Pl. 304. And he is not bound to support his declaration literally, but substantially. *Id.*, 316."

The rule stated in that case is followed in Keiser v. Topping et al., 72 Ill. 226, 229. In the instant case we think it clear that the defendants could protect themselves if a judgment were recovered against them in the present suit, if the same rights should come again in controversy. The present contention is not sustained.

The defendants contend that the court erred in sustaining plaintiff's demurrer to defendants' special plea of the Statute of Frauds. It appears that during the trial the defendants were given

leave to file instanter a special plea of the Statute of Frauds. The plaintiff filed a general demurrer to the plea and the court sustained the demurrer. As the plea was proper in form and substance the court should have overruled the demurrer and entered a rule on the plaintiff to file a replication to the plea.

The defendants complain that the trial court adopted an improper rule in re measure of damages.

The selling of the securities by the defendants commenced in July, 1920, and was finished in April, 1922. The court instructed the jury that in case they found the issues for the plaintiff his damages were \$57,507.31, and therefore the instructions furnish no light as to the rule followed by the court in fixing the damages, but we have carefully studied that part of the record that bears on this particular subject, and while we have found some difficulty in determining the exact method followed, we believe that the court adopted the following rule: Take the selling price of a security on the day it was sold as the market price for that day. Then take the market price of the same security on September 15, 1922, and the difference between the two, plus five per cent interest on the same from September 15, 1922, represented the damages to the plaintiff from the sale of said security. We think the rule adopted by the court was not the correct one.

Other errors are assigned and urged by the defendants, but we do not deem it necessary to pass upon the same.

For the reasons stated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

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The defendant complains that the trial court awarded

an excessive sum in the case of the plaintiff.

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For the reasons stated, the judgment is reversed and

the case remanded.

REVEREND THE COURT.

Given, at the City of New York, this 1st day of January, 1900.

467 - 31883

OTTO F. VONESH and
MARY KATHERINE VONESH,
Appellants,

v.

CITY OF BERWYN, FRANK J.
NOSEK, Commissioner of
Public Works, FRANK PAVENK,
Building Inspector,
JAMES MINES, Chief of Police,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The appellants filed, in the Superior Court of Cook County, a bill of complaint - and an amendment to the same - against the appellees, alleging that the complainants were the owners of certain real estate in the City of Berwyn; that on June 18, 1925, they made a written application for a building permit to erect upon said real estate a sixteen-apartment building in accordance with certain plans and a certificate of survey that were presented with the application; that the Commissioner of Public Works of said city admitted that the application, plans and certificate were in compliance with the building and other ordinances of the said city; that they paid the legal fees and complied with all the requirements for a permit; that a permit for the construction of said building was issued to them on the said date; that they thereupon began the construction of the building, and while so engaged work upon the same was stopped by the defendants, and the complainants were prevented from proceeding further by the defendants "upon the penalty of arrest;" that the building permit was valid and legal; that complainants would sustain irreparable damage by the said acts of the defendants, and complainants prayed that the defendants be enjoined from interfering

with the construction of the building. The answer of the defendants asks strict proof of the ownership of the real estate; alleges that the proposed building violates the zoning ordinances of the City of Berwyn; that the complainants had previously been refused permission to erect a twenty-four-apartment building on the premises; that the building ordinances of the said city were not complied with in the issuing of the permit, and that complainants were not entitled to the relief they asked. The case was referred to a master in chancery who heard evidence offered by the complainants and the defendants, and made a report, finding that on June 18, 1925, the defendant Otto F. Vonesh made an application to the City of Berwyn for a building permit, in which application he stated that he was the owner of the premises in question; that he desired to erect upon the premises a brick building to cost \$65,000, to be three stories high, and "to be occupied as a six-apartment building, subject to all ordinances of the City of Berwyn governing the construction of buildings;" "that on June 18, 1925, pursuant to said application, a building permit was duly issued by the said city, giving permission to the complainant Otto F. Vonesh, to construct a three-story and basement brick building, to cost \$65,000, to be occupied as a six-apartment building, subject to all ordinances of said City of Berwyn, governing the construction of buildings;" that said complainant began the construction of said building by excavating upon said premises, and that shortly thereafter the city, by its officers, ordered that work upon the building be stopped, and that the city has "ever since refused to permit said complainant to proceed with said construction;" that it was contended by the defendants, and not denied by the complainants, that the building that was to be erected upon the premises was to be an apartment building consisting of sixteen apartments; that the city official

who made out the application at the request of Vonash testified that said Vonash gave him all the "information" contained in the application; that the building permit provided that the building mentioned therein was to be occupied as a six-apartment building; that subsequently the application and permit were changed by order of Frank J. Norek, the Commissioner of Public Works and Building Commissioner of said city, so that the building mentioned in said application and permit was described "as a sixteen-apartment building." The master further found that at the time of the application for the permit there were in force in the said city certain zoning ordinances by the terms of which the construction of a sixteen-apartment building upon the property in question was prohibited; that the permit provided that the same was subject to all ordinances of the said city governing the construction of buildings; and the master concluded that the building which the complainant proposed to erect upon the premises was in violation of said ordinances and "that said building permit for a sixteen-flat building, even if regularly issued, was void and contrary to law," and recommended that the bill of complaint be dismissed for want of equity. Certain objections were made to the master's report and the chancellor, after considering the same, overruled them and entered a decree dismissing the bill for want of equity.

From the decree, the complainants prosecuted an appeal to the Supreme Court, upon the ground that the zoning ordinances in question were unconstitutional. The Supreme Court (Vonash et al. v. The City of Berwyn et al., 324 Ill. 493) held that it did not appear from the pleadings that a construction of the constitution was involved and that no constitutional question was raised by the assignment of errors attached to the record, and the cause was transferred to this court.

The complainants contend that the zoning ordinances in question are invalid for the following reasons:

"a. It does not divide the city into definite districts as required by the Statute authorizing a municipality to zone its territory.

"b. It fails to establish certain definite boundary lines between differently classified territory.

"c. It delegates authority to the owners of blocks not divided into lots to establish the boundary line between different classes of territory.

"d. The discrimination in favor of public service corporations is illegal."

This contention is plainly an afterthought of the trial, because it does not appear from the pleadings or the evidence to have been raised during the trial and no such question is raised by the assignment of errors in the case. The complainants' bill is based upon the theory that the permit and the plans for the building were in strict compliance with the requirements of the ordinances of the City of Berwyn. The bill alleges "that said Commissioner of Public Works of said City of Berwyn, has stated to your orators that said certificate of survey and plans submitted are in strict compliance with the requirements of the building ordinances of the City of Berwyn, and your orators state as a matter of fact, that the said certificate of survey and plans submitted and duly approved, are in strict compliance with the building ordinances of the City of Berwyn, and that said permit was legally issued and is in strict compliance with all of the ordinances of the City of Berwyn, * * * and your orators further allege that said Commissioner of Public Works of the said City of Berwyn has also stated that said real estate upon which they propose to erect said building is zoned in and by the zoning ordinances of the City of Berwyn, for the use for which said building is about to be constructed." The complainants, therefore, have no right to raise in this court the question that the zoning ordinances of the City

of Berwyn are invalid.

It is conceded that the building that was to be erected by the complainants upon the premises in question was to be an apartment building consisting of sixteen apartments. The master found that at the time of the application for the permit there was in force in the City of Berwyn a certain zoning ordinance by the terms of which the construction of a sixteen-apartment building upon the property in question was prohibited. No objection was made to the finding that the erection of such a building would violate the said zoning ordinances. Indeed, none could be seriously made under the undisputed evidence in the case. Therefore, the contention of the defendants that the erection of such a building was in violation of the zoning ordinances stands unchallenged, and it is unnecessary to refer specifically to the section of the zoning ordinance that was violated. The city official who granted the permit had no authority to issue it and the permit was invalid. (Rippinger v. Niederst, 317 Ill. 264, 276; Burton Co. v. City of Chicago, 236 Ill. 383.) The defendants had the right, and it was their plain duty, to stop the erection of the building in question.

The defendants assert several other meritorious grounds why the complainants were not entitled to the relief they sought, but we do not deem it necessary to refer to these.

In conclusion, we feel impelled to say that the record in this case shows that one of the complainants and at least one of the officials of the City of Berwyn schemed to allow the complainants to erect a building on the premises in question the plans of which building intended a plain violation of the zoning laws of the city.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

THEODORE WOLNIEWICZ,
Appellee,

v.

JOHN A. SCHEFFLER and
MARY SCHEFFLER,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The appellee, Theodore Wolniewicz, hereinafter called the plaintiff, filed a complaint in forcible detainer in the Municipal court of Chicago against the appellants, John A. Scheffler and Mary Scheffler, hereinafter called the defendants, alleging that he was entitled to the possession of certain premises in the City of Chicago. The case was tried before the court and a jury and a verdict was returned in favor of the plaintiff. Judgment was entered on the verdict and this appeal followed.

The defendants occupied the premises in question under a written lease, in which the plaintiff was the lessor and both of the defendants were lessees. The term of the lease had not expired when the proceedings were commenced.

The sole ground alleged by the defendants why the judgment should be reversed is that the evidence shows that service of demand or notice was not made as to one of the defendants, Mary Scheffler.

The proof in reference to service is as follows:
Mr. Russell, attorney for the plaintiff, testified that on November 18, 1926, he personally served a written notice by delivering a copy of the notice to the defendant John A. Scheffler;

that at the time of the service, the two defendants and Mr. Danisch, their attorney, were in a corridor in the City Hall and that he approached them and gave Mr. Scheffler a copy of the notice. John A. Scheffler testified that the witness Russell handed him only one paper. Mary Scheffler testified that she did not receive a notice of the termination of the lease; that on November 18, 1926, she and her husband and Mr. Danisch were in the hallway of the City Hall talking; that "I was looking around and when I again turned to face my husband he had a paper in his hand which he handed to Mr. Danisch;" that at no time prior to the commencement of the suit did she receive a copy of the notice. This was all of the evidence that was given in the matter of the service of demand or notice. The written notice that was handed to John A. Scheffler was addressed to John A. Scheffler and Mary Scheffler.

Section 10 of Chapter 80 of the Illinois Statutes governs the manner in which service of demand or notice may be made. That section reads as follows:

"Par. 10. Service of demand or notice. § 10. Any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant, or by leaving the same with some person above the age of twelve years, residing on or in possession of the premises; and in case no one is in the actual possession of said premises, then by posting the same on the premises."

This section provides three methods for service. The facts of the present case make it clear that the alleged service was not obtained by either the second or third method. Was it obtained by the first method? This is the sole question before us.

The contention of the plaintiff is that the notice was addressed to both defendants and that the statute is satisfied, in such a case, where it is served upon one, providing the other

that at the time of the service, the two defendants and Mr. Lantich, their attorney, were in a corridor in the City Hall and that an apartment house and City Hall building a copy of the notice. John A. Schellier testified that the witness himself handed him only one paper. Mary Schellier testified that she did not receive a notice of the termination of the lease; that on September 13, 1934, she and her husband and Mr. Lantich were in the hallway of the City Hall building; that "I was looking around and when I again turned to face my husband he had a paper in his hand which he handed to Mr. Lantich;" that at no time prior to the commencement of the suit did she receive a copy of the notice. This was all of the evidence that was given in the matter of the service of demand or notice. The written notice that was handed to John A. Schellier was addressed to John A. Schellier and

MARY SCHELLIER.

Section 19 of Chapter 80 of the Illinois Statutes governs the manner in which service of demand or notice may be made. That section reads as follows:

"Sec. 19. Service of demand or notice. - A demand or notice served by delivering a written or printed or partly written and printed copy thereof to the person, or by leaving the same with some person of the age of twelve years, residing on or in possession of the premises, and in case he is in the actual possession of said premises, then by leaving the same on the premises."

This section provides three methods for service. The facts of the present case make it clear that the alleged service was not obtained by either the second or third method. Was it obtained by the first method? This is the sole question before

me.

The contention of the plaintiff is that the notice was addressed to both defendants and that the record is established in such a case, where it is served upon one, providing the other

party had notice of the same; that in the present case it is to be presumed that Mary Scheffler got the notice, as she was a witness on the stand and did not deny that she had knowledge of the service.

"The action of forcible entry and detainer, or forcible detainer, is a special statutory proceeding, summary in its nature and in derogation of the common law, and it follows that the conditions and requirements that the statute prescribes in conferring jurisdiction must clearly exist, and that the mode of procedure provided by it must be strictly pursued."
(Pitagerald v. Quinn, 165 Ill. 384, 360.)

Many other cases to the same effect might be cited, but the rule stated is so well known and so firmly established that further references are unnecessary.

In forcible entry and detainer, where the statute specifically describes the manner in which the notice or demand shall be served, its requirements must be strictly observed. (26 Corpus Juris 839; 19 Cyc., Law & Pro. 1145.) This rule merely follows the more general one that the mode of procedure must be strictly followed.

Plaintiff cites the following cases in support of his contention: Bell v. Bruhn, 30 Ill. App. 300; Farnam v. Hohman, 90 Ill. 312; Gibbs v. Van Deralice, 134 Ill. App. 183. None of these cases sustain the contention of the plaintiff and they all relate to service of demand or notice by the second method, viz: "By leaving the same with some person above the age of twelve years, residing on or in possession of the premises." To obtain service by the first method provided in section 10 the statute, in our judgment, plainly declares that the written notice shall be delivered to the tenant personally. The Supreme Court of the United States, in Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 34, so interprets the statute and we have found no case

partly but notice of the same had in the present case it is to be presumed that Mary Schellier got the notice, as she was a witness on the stand and did not deny that she had knowledge of the service.

"The action of Township entry and detention, or Township settlement, is a special statutory proceeding, summary in its nature and in character of the remedy, and it follows that the commission and witnesses named in the statute are not to be construed to require that the service be made by the sheriff or his deputy, and that the same may be made by any person authorized by law to make a lawful service."

Many other cases to the same effect might be cited, but the rule stated in so well known and so firmly established that further reference is unnecessary.

In Township entry and detention, where the statute specially requires the sheriff to make the notice to be made, the Township entry and detention may be made by the sheriff.

(See Corpus Juris 229; 10 Cyc., law & Proc. 1182.) This rule merely follows the more general one that the mode of procedure may be specially followed.

Malinck also cites the following cases in support of his contention: Malinck v. State, 21 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"By leaving the same with some person above the age of twelve years, residing or at the possession of the premises." To obtain service by the first method provided in section 10, the sheriff, in our judgment, plainly declares that the written notice shall be delivered to the county government. The supreme court of the

United States, in Malinck v. State, 21 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

that construes it differently. The plaintiff by his contention practically asks the court to nullify the statute.

The following cases show that the courts follow the statute strictly: "A demand made by reading a paper to the tenant, is not a demand made in writing. It is but an oral demand. The statute intended that the tenant should have a written demand, to which he could refer and which he could examine, that he need not depend upon his memory to know what the demand was." (Reems v. McLees, 24 Ill. 193, 194.) To the same effect is Lehman v. Whittington, 8 Ill. App. 374, 377; Doss v. Craig, 1 Colo. 177, 179.

Missouri has a service of demand or notice statute substantially the same as ours. In Hyde v. Goldsby, 25 Mo. App. 29, it is held that sending a copy of the written notice to the defendant through the mails is not sufficient, and the court says that "under statutes like this, it is not the fact that the party to be notified has actual knowledge of the fact, but it is proof that it has been conveyed to him in the prescribed method that gives the right of action. * * * The statutory method, once broken through, would open wide the gates for vicious precedents, which rapidly multiply, and too often, in the end, practically nullify the will of the legislature." In Barbee v. Evans, 220 Ill. App. 154, 158, the court held that a written notice sufficient in form and substance mailed by the landlord to the tenant and received by him, was not service on the tenant in the manner provided by section 10. In Whitehill et al. v. Cooke, 140 Ill. App. 520, 522 (a forcible detainer suit), the court quotes with approval the following rule stated in Sutherland on Statutory Construction, sections 392 and 393: "A party seeking the benefit of such a statute must bring himself strictly not only within the spirit but its letter; he can take nothing by intendment."

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cases the tenant should have a written demand, to which he could refer

for and which he could examine, that he need not depend upon his

memory to know what the demand was." (Boyd v. Nelson, 22 Ill. 193,

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377 Howe v. Craig, 1 Ohio 177, 178.

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in form and substance mailed by the landlord to the tenant and

received by him, was not service on the tenant in the manner

provided by section 10. In Whitfield et al. v. Coffey, 140 Ill.

App. 280, 282 (a former Justice said), the court agrees with

approval the following rule stated in Wetherill on Easements

Construction, sections 302 and 303: "A party seeking the benefit

of such a statute must bring himself strictly not only within

the spirit but the letter; he can take nothing by inadvertence."

We hold that service of demand or notice, as provided for in section 10 was not had as to the defendant Mary Scheffler.

At first blush, this ruling, under the facts of the present case, may seem more technical than just, but when it is considered that the forcible detainer act is summary in its nature and in derogation of the common law, it is no hardship to require a landlord who seeks its assistance to follow strictly the mode of procedure provided by it. If the courts did not insist on a strict compliance with the statute, great injustices to tenants would inevitably follow.

By the statute, proof of service of demand or notice in accordance with section 10 is a condition precedent to the plaintiff's right of recovery. Until such demand is made the tenant is not guilty of forcible detainer under the statute, and the proof of the demand is an essential part of the plaintiff's case, as much so as proof of the tenancy. (Seems v. McLees, supra; Lehman v. Whittington, supra; Doss v. Craig, supra.) Under the law, therefore, the present judgment must be reversed without remanding.

The judgment of the Municipal court of Chicago is reversed.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

It is held that service of demand or notice, as provided for in section 11, is not necessary in the absence of a demand or notice.

It is further held, that under the facts of the present case, the court is not bound to grant a decree, but when it is

considered that the defendant has not in fact been injured and in derogation of the common law, it is not necessary to require

a finding that the defendant is liable to pay damages or a decree provided by law. If the court did not insist on a

strict compliance with the statute, great injustice to the plaintiff would be done.

By the statute, proof of service of demand or notice is not necessary in a petition for recovery of the

plaintiff's right of recovery. Until such demand is made the defendant is not liable for recovery of the amount.

It is held that the statute is not intended to deprive the plaintiff of his right of recovery, but to require proof of the defendant's

liability, as shown by the facts of the case. (See Wheeler v. Wheeler, 100 N. D. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 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145 - 31785

ELIZABETH A. PEARSON,
Appellee,

v.

RICHARD W. FARMER,
Appellant.

APPEAL FROM SUPERIOR COURT.

COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The appellee, Elisabeth A. Pearson, hereinafter called the plaintiff, sued the appellant, Richard W. Farmer, hereinafter called the defendant, for personal injuries alleged to have been sustained by the plaintiff in an automobile accident on October 14, 1923. This is the second trial of the cause. On the first, the jury found the defendant guilty and assessed the plaintiff's damages at \$1800, and the court awarded the defendant a new trial. On the present trial the jury found the defendant guilty and fixed the plaintiff's damages at \$5500. The ad damnum was \$5000 and the plaintiff remitted \$500 from the verdict, and the court entered judgment for \$5000, and this appeal followed.

The defendant contends that there was a preponderance of evidence in favor of the defendant. Two juries have found the defendant guilty, and after a very careful examination of all the evidence in the case we are unable to say that the verdict is manifestly against the weight of the evidence.

The defendant contends that the plaintiff's counsel made improper statements to the jury in his closing argument. It appears from the record that the plaintiff, on the first trial of the case, produced as a witness Dr. Koerper, a physician, who attended the plaintiff, and that on the second trial this physician was not called by the plaintiff. It further appears

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REPORT OF THE

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that during the presentation of the evidence for the plaintiff the plaintiff's counsel, answering an inquiry of the defendant's counsel, stated that he did not expect to call this physician and that the defendant might do so if he saw fit. The language of plaintiff's counsel complained of, as stated by defendant's counsel, is as follows: "The evidence is undisputed, gentlemen, that these bones are broken in the way we have shown. Why didn't we bring in that other doctor? You don't know a thing about him. Only you knew this, that he didn't know about these fractures. That can only be seen by X-ray pictures and he didn't know about that, you know that. * * * This man treated this woman for months and months and he didn't know, at least by a picture, whether there were fractures or not, and how do you know but what these people feel very unkindly toward him and feel he bungled her case." The objection made by the defendant's counsel to the trial court, to the first part of this statement was that nobody had testified to what Dr. Koerper would testify and therefore the argument was improper. To this objection the plaintiff's counsel stated that it was a fact that the evidence did not show what the doctor would testify to, if called, and the trial court stated that there wasn't any evidence in the record as to what the doctor knew. It also appears in the record that Dr. Koerper had not taken or caused to be taken any X-ray picture of the plaintiff's body.

The abstract of the record does not show the argument of the defendant's counsel to the jury, but we have read the same in the record and we find that he argued at great length in reference to the fact that the plaintiff had not called Dr. Koerper and he repeatedly challenged the plaintiff's counsel to tell the jury why he had not produced Dr. Koerper. He told the jury that the doctor was friendly to the plaintiff and stated that it was his personal opinion that the doctor's testimony, had he been called, would

that during the investigation of the evidence for the identity
the plaintiff's account, concerning an injury to the defendant's
member, stated that he was known to him with physical and
that the defendant's injury to him is not his. The defendant is
plaintiff's account, however, he is stated by defendant's account
is as follows: "The evidence is undisputed, however, that there
never was broken in the way we have shown. My father was living in
that other house. The fact is that a year after that, the
fact that he is that's what about these injuries. That was
only be seen by a very person and he didn't know where that was
then, that's it. This was because that was the house and house
and he didn't know, at least he is a person, however, that was
the house on that, and that is not what that house was, that
very seriously, however, he was told he worked for that. The
evidence was by the defendant's account, to the fact that, as
the fact was it was because that was what that was, that was
that the defendant was living in that house, the defendant was
therefore. The fact was that the plaintiff's account, that
to what that was was what that was, that was what that was
factually, at all times, and the fact was that that was what
was evidence in the evidence as was the other house. In this
evidence in the evidence that the defendant was not what he
on before by a very person at the plaintiff's house.

The defendant of the house was that the defendant at
the defendant's account of the fact, that he was not the fact in
the house and he was that the house was what that was, that was
in the fact that the plaintiff was not what that was. However, that was
repeatedly, however, the plaintiff's account, he was the fact was
he was not because of the house. He was the fact was the house
and evidence in the plaintiff's account that it was the house
evidence that the house's evidence, that he was, that was, that was

have been harmful to the plaintiff's case. He imputed to the plaintiff's counsel improper motives in not calling Dr. Koerper, although that sort of an argument was not warranted by the evidence in the case. Counsel also complains of that part of the argument of the counsel for the plaintiff in which he said: "And how do you know but what these people feel very unkindly toward him and feel he bungled her case?" Dr. Koerper did not take or have taken any X-ray picture, and it is also in proof that when another doctor was called he caused an X-ray picture of her left leg and ankle to be made, and this doctor, as well as another one called by the plaintiff, testified that the X-ray picture showed certain fractures, and the evidence tended to prove that a certain alleged fracture in the left leg of the plaintiff could be detected only by means of an X-ray picture. We cannot say that the statements complained of were improper, especially when they are considered in connection with the argument made by the counsel for the defendant. It would also appear that the defendant's counsel at the time of the argument did not think the statements as harmful as he now contends they were as he did not even ask the court to instruct the jury to disregard either of the statements he now complains were prejudicial.

The defendant also objects to the following statement of plaintiff's counsel: "It is my claim a very moderate verdict in this case would be \$5000." Plaintiff's counsel had been arguing at length as to what the evidence showed the plaintiff's injuries were and what would be a fair compensation for the same. When the statement complained of was made, counsel for the defendant objected to the same on the grounds that "counsel has no right to make any statements of the amount, or make any claim. All he can do is present the evidence, and if he does claim that the evidence will sustain it - Mr. McShane: I claim that, and he knows that is all I claim, the evidence. Mr. Bloomington:

have been brought in the plaintiff's name. He wanted to the
 plaintiff's name, and the plaintiff's name is the plaintiff's name.
 although that is an argument and not a statement of the evidence
 in the case. The plaintiff also complains of that part of the argument
 of the counsel for the plaintiff in which he said "and how do
 you know that those people that were actually looking at the
 fact he brought out there?" The answer is that we have taken
 our 3-ray picture, and it is also in fact that when another picture
 was taken he looked at 3-ray picture of that fact and while he
 he looks, and this picture, as well as another was taken by the
 plaintiff, testifies that the 3-ray picture showed certain features,
 and the evidence tended to prove that a certain thing was done in
 the fact of the plaintiff could be proven only by means of an
 X-ray picture. We cannot say that the plaintiff's complaint of your
 argument, especially when they are concerned in connection with
 the argument made by the counsel for the defendant. It is also
 apparent that the defendant's counsel at the time of the argument
 did not think the argument as stated to be very important. They
 were as he did not say that the court is looking for the fact of the
 report of the plaintiff as not containing any evidence.
 The defendant also objects to the following statement
 of plaintiff's counsel: "It is my claim a very important fact
 in this case would be that, plaintiff's counsel has been stating
 at length as to what the witness showed the plaintiff's picture
 were and that would be a fair representation for the case. That
 the plaintiff's complaint of the fact, I think, for the defendant
 objected to the fact of the picture that I showed him, he rights
 to make any statement of the counsel, or any say claim. All he
 can do is present the argument, and all he does claim that the
 statement will contain it - Mr. Defendant: I claim that, and the
 counsel that he is I claim the argument. Mr. Plaintiff:

There is a vast difference between the evidence and what he claims. Mr. McShane: That is all, I said." The court did not rule on the objection nor was he requested to by counsel for the defendant, and it is quite apparent from the record that the counsel for the plaintiff was predicated his argument upon the evidence in the case and that the court and defendant's counsel, after the explanation of Mr. McShane, so understood it. In Graham v. Mattson City Ry. Co., 234 Ill. 483, 491, the court said: "We do not think that there is any valid objection to counsel, in argument, telling the jury what, under the evidence, counsel considers a fair compensation for the injury received."

The defendant contends that the court erred in admitting a photograph of the place of the accident, on the grounds that the photograph was not a correct representation of the conditions as they existed when the accident happened. We find no merit in this contention. In our opinion, the photograph portrays the ditch in a much more favorable light for the defendant than the undisputed oral evidence with respect to the same. The defendant was aided rather than injured by the introduction of the photograph.

The defendant complains that the court erred in allowing a witness for the plaintiff to testify that immediately after the accident he stated to the defendant: "You have made a fine mess of it," and that the defendant, in response thereto, said: "Well I am very sorry, I didn't realize what I was doing." The record shows that defendant's counsel made no objection to what the witness said he stated to the defendant. The objection to the answer of the defendant was that "it did not state any facts from which any deductions could possibly be drawn by anybody." We think the alleged statement of the defendant was in the nature of an admission and that the weight of it was for the jury to determine under all the facts and circumstances in the case. The plaintiff proved, without

There is a vast difference between the evidence and what he claims.
The defendant, "That is all," he said. "The court did not take on the
objection and was not prepared to do so." The defendant, and
it is quite apparent from the record that the court took the plain-
tiff was presenting his argument upon the evidence in the case and
that the court was not taking any action, after the explanation of

the defendant, as mentioned in the record. The defendant, "That is all,"
he said, and the court said: "We do not take that there is
any valid objection to the evidence, inasmuch as the jury shall
select the evidence, and the court considers a fair comparison for the
jury to make."

The defendant's contention that the court acted in violation
of the right of the plaintiff to see the evidence, in the defendant's
photograph was not a correct representation of the evidence as
they existed when the evidence was taken. It is not correct to say
that the defendant's contention that the photograph was taken in
a dark room, and that the light for the photograph was the defendant's
own witness, and that the defendant was not. The defendant was not
the defendant's witness, as the defendant was not.

The defendant's contention that the court acted in violation
of the right of the plaintiff to see the evidence, in the defendant's
photograph was not a correct representation of the evidence as
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that the defendant's contention that the photograph was taken in
a dark room, and that the light for the photograph was the defendant's
own witness, and that the defendant was not. The defendant was not
the defendant's witness, as the defendant was not.

objection by the defendant, that the defendant after the accident stated that he had been used to driving a small car, a Ford, and that the car he used at the time of the accident was a much bigger car and he misjudged the distance - "that he crowded in too quick." In view of this evidence that was admitted without objection, the present contention seems an idle one.

The defendant contends that the court erred in allowing Dr. Magnuson, a witness called by the plaintiff, to answer the following question, over the objection of the defendant: "Now, if at all, doctor, do the combination of these conditions described affect the strength of the foot and ankle?" It appears from the record that the defendant's counsel objected to this question, and it was not answered. Thereupon the court put the following question to the witness: "What effect would the condition described there have, if any, upon the condition of the foot?" Defendant's counsel made no objection to this question, and when an answer was made to the same by the witness defendant's counsel moved to strike out the last portion of the answer on the grounds that the witness had used the word "serious," and that the courts decried the use of that word. The court thereupon struck out from the answer the word "serious," and thereupon the counsel stated, "all right, that is the principal objection to it." The present contention is without any merit.

The plaintiff was on the stand and was being interrogated as to the treatments given her by an osteopath doctor. The following question was put to her: "That did his treatment consist of?" A. Well, he would bend the ankle every which way. The ankle was what they call 'ankylosed,' or something. They said it was going to be absolutely stiff. Mr. Bloomington: I object to that. Mr. McShane: Yes, strike that out. The Court: It may be stricken." Counsel for the defendant now complains that the last part of the

objection by the defendant, that the defendant after the evidence showed that he had been used in giving a small part of the money that he had in hand at the time of the evidence was a small part of the money and the defendant - "that he received in the bank." In view of this evidence that was admitted without objection, the court sustained the motion for this case.

The defendant further said the court was in error in its decision, a witness called by the plaintiff, to answer the following question, from the opinion of the defendant, "that it is not, stated, in the opinion of these witnesses described above, the opinion of the first and second, is sufficient to show that the defendant's account is correct in this question, and it was not admitted. However, the court and the plaintiff's question to the witness, "that after seeing the defendant's account, which, it was, upon the opinion of the first, defendant's account, was as stated in this position, and that as stated was made to the court by the witness defendant's account, which was stated in the opinion of the court, that the witness had made the most probable," and that the court decided the case in that way. The court sustained the motion and from the motion the court sustained, and however, the court stated, "all right, that is the principal objection is it." The court sustained the motion and said:

The plaintiff was in the room and was being interviewed as to the testimony given by an expert's witness. The witness was asked and he said "that all the witnesses stated that he said, he would have been every other way. The witness was that they said 'satisfied,' or satisfied. They said it was said to be satisfied. With the defendant, I repeat in that." The witness, the court said, "the court, it may be satisfied," because for the defendant was explained that the first part of the

answer of the plaintiff was highly prejudicial to the defendant and that the court's action in striking out the answer "did no good." The record appears to show that the counsel at the time in question did not consider the answer so prejudicial as he now claims, as he did not see fit to ask the court to direct the jury to disregard the answer of the plaintiff nor did he ask to have a juror withdrawn, and we think that the court's ruling, especially in view of the fact that the counsel for the plaintiff immediately joined in the motion of the defendant to have the answer stricken, cured any possible error.

The defendant contends that the damages are grossly excessive and that the amount allowed by the jury shows passion and prejudice. We do not agree with the counsel that the amount allowed shows passion and prejudice, but after a very careful consideration of all the evidence relating to the injuries to the plaintiff we have reached the conclusion that the amount allowed is excessive, and in our judgment \$3000 would fairly compensate the plaintiff for the damages she sustained. If the plaintiff will within ten days file a remittitur of \$2000, the judgment will be affirmed for \$3000, otherwise the cause will be reversed and remanded.

AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

Barnes, F. J., and Gridley, J., concur.

246 I.A. 620³

EDWARD ELLIS, SAMUEL ELLIS,
GEORGE ELLIS and JOSEPH ELLIS,
copartners trading as
ELLIS BROTHERS COMPANY,
Appellees,

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

v.

THE PENNSYLVANIA RAILROAD
COMPANY, a corporation,
Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The appellees, Edward Ellis, Samuel Ellis, George Ellis and Joseph Ellis, copartners trading as Ellis Brothers Company, hereinafter called the plaintiffs, sued the appellant, The Pennsylvania Railroad Company, a corporation, hereinafter called the defendant, in trespass on the case on promises. The amended declaration of the plaintiffs alleged (inter alia) that the defendant was a common carrier and that the plaintiffs delivered to it a carload of strawberries for transportation; that the berries were all in good, sound, merchantable and shipping condition; that the defendant did not deliver the shipment within a reasonable time, nor in a like condition as received, but delayed the shipment beyond a reasonable time and delivered the berries in a damaged and deteriorated condition, "and during said delay the market greatly and seriously fell off and declined to the damage of the plaintiff in the sum of Three Thousand Dollars." Plaintiffs filed with the declaration an affidavit of claim, the material part of which is as follows: "That the plaintiff's claim is for money damages to shipments described in the declaration which damage was caused by negligent handling, delay, serious and physical deterioration of the berries as well as the market decline; after allowing the defendant all of its

just claims and set-offs, there is due from the defendant to the plaintiff the sum of \$896.50." The defendant filed an affidavit of merits, the material part of which is as follows:

"That the said defendant has a good and sufficient defense upon the merits to the whole of the plaintiffs' demands and that the nature of said defense is as follows:

"This affiant denies that the defendant had a contract with plaintiffs as described in plaintiffs' amended declaration or the affidavit of claim in support thereof.

"This affiant denies that the defendant ever had a contract with plaintiffs for the payment of money.

"This affiant denies that the shipment described by plaintiffs was handled in a negligent manner by the defendant.

"This affiant denies that the shipment described by the plaintiffs was delayed by the defendant.

"This affiant admits that the damage, if any, of which plaintiffs complain, was caused by the serious and physical deterioration of the commodity and consequent market decline, but through no fault of this defendant.

"This affiant denies there is due from defendant to the plaintiff the sum of \$896.50 or any sum whatever."

The plaintiffs moved the court "to strike the defendant's affidavit of merits from the files and for judgment, for failure to file a proper affidavit of merits." The court granted the motion of the plaintiffs to strike the affidavit of merits and the defendant elected to stand by its affidavit of merits. The plaintiffs thereupon moved "that judgment for \$896.50 be entered in favor of the plaintiffs and against the defendant, as if by default for failure to file affidavit of merits," and this motion, over the objection of the defendant, was allowed and judgment was entered by the court for \$896.50. This appeal followed.

The plaintiffs have not filed a brief in this court, nor have they entered an appearance.

The defendant assigns several reasons why the judgment should be reversed. In the view that we take of the appeal,

that claim and not-etc., means is that the defendant is the
plaintiff and not of plaintiff. The defendant is not of plaintiff.

It means the defendant is not of plaintiff.

"That the defendant is not of plaintiff means a great deal more than
between whom the action is brought. It means that the defendant is not of plaintiff
because and that the action is not of plaintiff."

"This action means that the defendant is not of plaintiff
and that the action is not of plaintiff. It means that the defendant is not of plaintiff
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The action is not of plaintiff.

it is only necessary for us to consider one. The defendant contends that by section 55 of the Practice Act the defendant is required in its affidavit of merits to go no further than to deny the material allegations contained in the affidavit of claim and that the defendant by its affidavit fully meets the requirements of that rule; that it is the law in this state that if any portion of an affidavit of merits sets up a legal defense it is reversible error for the court to strike the affidavit of merits from the files, and that not only is there one good defense set up in defendant's affidavit of merits but that each and every defense contained therein is a good and sufficient defense at law.

Plaintiff can prove and recover only what is stated in his affidavit of claim. (Reddig v. Looney, 208 Ill. App. 413, 420.)

It clearly appears that the defendant in its affidavit of merits specifically denies all the facts alleged in the plaintiffs' affidavit of claim and in our judgment the affidavit of merits was sufficient, and it was error for the court to strike it from the files and enter judgment by default. Wolfert v. David Lipsay Co., 139 Ill. App. 35, is a case in point. Others to the same effect might be cited, if it were necessary.

The affidavit of merits in the present case certainly contained at least one good legal defense and as the plaintiffs' motion to strike was general, and gave no notice of other than general objections, it amounted to no more than a general demurrer, and therefore the motion should have been denied. (American Hard Rubber Co. v. Hong, 280 Ill. 431, 435.)

For the reasons stated, the judgment of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

It is only necessary for us to consider one. The defendant now
 wants that by section 22 of the Evidence Act the defendant is
 presumed in the absence of evidence to be the author of the deed
 and that presumption is contained in the Evidence Act and
 that the defendant by the Evidence Act is presumed to be the author
 of that deed. It is the law in this case that it is not possible
 of an affidavit of service made on a legal document in its reasonable
 nature for the court to make the affidavit of service from the
 time, and that not only in those cases but also in every other
 defendant's affidavit of service but that each and every defendant
 defendant must be a party and defendant must be a party
 defendant must be a party and defendant must be a party in
 the affidavit of service. (Section 22, Evidence Act, 1908, s. 22.)
 It is clearly apparent that the defendant in the affidavit of
 service is not a party to the deed and is not a party to the deed
 affidavit of service and in the defendant's affidavit of service and
 affidavit, and it was never for the court to make it from the
 time and never defendant's affidavit. (Section 22, Evidence Act, 1908, s. 22.)
 1908, s. 22, is a case in point. It is a case in point.
 It is a case in point. It is a case in point.
 The affidavit of service in the present case contains
 defendant's affidavit of service and is not a party to the deed and
 section 22 of the Evidence Act, and gave no notice of other law
 general rejection. It is not a case in point. It is not a case in point.
 and therefore the section should have been rejected. (Section 22, Evidence Act, 1908, s. 22.)
 (Section 22, Evidence Act, 1908, s. 22.)
 For the reasons stated, the judgment of the court
 is hereby reversed and the case remanded.
 (Section 22, Evidence Act, 1908, s. 22.)

32024

CHICAGO TITLE & TRUST COMPANY,
an Illinois corporation,
as trustee,
(Complainant),

Appellee.

v.

CHARLES BELMAN, Jr., et al.,
(Defendants),

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

OF COOK COUNTY.

ON APPEAL OF MAURICE W. KULWIN
from the interlocutory order
appointing Receiver,
Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a foreclosure proceeding in the Circuit Court of Cook County, the chancellor entered an order appointing the Mid-City Trust & Savings Bank receiver. From that order Maurice W. Kulwin, one of the defendants, prayed an interlocutory appeal.

The Mid-City Trust & Savings Bank made a motion in this court to dismiss the appeal on the grounds that the Circuit Court, after the entry of the order appointing the said receiver, of its own motion, entered an order discharging it as receiver, and that therefore this court in passing upon the present appeal would be merely deciding a moot question. The appellant opposed the granting of the said motion, but admitted the entry of the order of discharge. On October 24, 1927, this court entered an order denying the motion of the Mid-City Trust & Savings Bank to dismiss this appeal, but since the entry of that order we have given further consideration to the motion.

In the recent case of Bobieski v. City of Chicago, 325 Ill. 259, 260, the court said:

"From the briefs filed in the consolidated cause it appears that plaintiff in error has paid the judgments which it was commanded to pay but did not pay the costs in the mandamus proceedings. The principal question involved in the mandamus proceedings no longer exists. The only purpose in reviewing the action of the Appellate Court in affirming the order of the circuit court directing the writs to issue is to determine who shall pay the costs in the mandamus proceedings. Where the substantial questions involved in the trial court no longer exist this court will not review the cause merely to determine the liability for costs. Wick v. Chicago Telephone Co., 277 Ill. 338; In re Croker, 175 N. Y. 158, 67 N. E. 307; Wingert v. First Nat. Bank, 223 U. S. 670, 32 Sup. Ct. 391; 3 Corpus Juris, 365."

In Wick v. Chicago Telephone Co., 277 Ill. 338, 341,

the court said:

"When there is no real present question involving actual interests and rights for a reviewing court to consider, the court should not be compelled to review a cause merely for the purpose of determining who ought to pay the cost of the suit. So far as we know, this exact question has never been presented to this court for decision. We are inclined to follow the other courts of last resort which hold that a reviewing court should not be called upon to decide questions that no longer exist, merely for the sake of making a precedent or of deciding the case to settle a simple matter of costs. Faucher v. Gragg, 60 Iowa 506; 15 N. W. Rep. 302; Dunn v. State, 163 Ind. 317; 71 N. E. Rep. 290; Stauffer v. Salemonie Mining and Gas Co., 147 Ind. 71; 46 N. E. Rep. 342; 3 Corpus Juris, sec. 115, p. 360, and cases there cited."

In High on Receivers, 4th Ed., § 848a., the author

says:

"When an appeal has been taken or writ of error or other process sued out to review an order appointing a receiver, and, pending the hearing of the appeal, it is brought to the attention of the reviewing court that the receiver has been finally discharged by the court of his appointment, the correctness of the order of appointment thereby becomes merely a moot question and the appeal should be dismissed."

The appellant in resisting the motion to dismiss the appeal, claimed that the receiver, Mid-City Trust & Savings Bank, after the appointment and before the discharge, accumulated rents that rightfully belonged to the appellant, and that to dismiss the present appeal would be to place obstacles in the way of the

appellant when he attempts to recover the rents. We see no merit in this contention. If the Mid-City Trust & Savings Bank when it was acting as receiver collected any rents that rightfully belonged to the appellant, the latter may recover the same in the Circuit Court and in the foreclosure proceedings, as that court, notwithstanding the discharge order in question, still has full power and authority over the monies in the hands of the Mid-City Trust & Savings Bank.

The order of October 24, 1927, denying the motion of the Mid-City Trust & Savings Bank to dismiss the present appeal is vacated and the motion to dismiss the appeal is allowed.

ORDER OF OCTOBER 24, 1927, DENYING MOTION
TO DISMISS APPEAL VACATED. MOTION OF
MID-CITY TRUST & SAVINGS BANK TO DISMISS
APPEAL ALLOWED.

Barnea, S. J., and Gridley, J., concur.

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32427

TED CLARE,
Appellee,

vs.

MARKS BROS. THEATRES, INC.,
et al., a Corporation,

MARKS BROS. THEATRES, INC.,
a Corporation,
Appellant.

6279
246 I.A. 621
APPEAL FROM INTERLOCUTORY ORDER
GRANTING INJUNCTION WITHOUT
NOTICE AND WITHOUT BOND.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant, Marks Bros. Theatres, Inc., a corporation, seeks to reverse an order entered by the Circuit court of Cook county restraining it from continuing certain advertising matter.

On September 21, 1927, complainant filed his bill of complaint against the Marks Bros. Theatres, Inc., a corporation, and other defendants. The bill was verified and on the same day, upon motion by the solicitor for the complainant, the court entered the order the reversal of which is sought.

The order is as follows: "The court having read the verified bill of complaint filed herein and being fully advised in the premises, it is ordered, for good cause shown, that the Writ of Injunction be and it is hereby issued without notice and without bond against Marks Bros. Theatres, Inc., restraining it from in any manner advertising the complainant's services at the Granada Theatre or any other theatre owned or operated by the said Marks Bros. Theatre Inc. And that the said Marks Bros. Theatre, Inc. are further ordered to amend any advertising matter already contracted with newspapers insofar as complainant is concerned and to cease any further advertisement^{of} complainant's services until the further order of this Court."

The allegations of the bill are in substance that com-

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Information on this is being furnished to you as requested.

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11/20/72 Monday, all the students at the school are out of school because of the weather.

or any other financial institution or organization.

It seems that the only way to avoid this is to use a different type of data structure, such as a hash table, which can store and retrieve data in a more efficient manner.

1. The following observations indicate that the system is not a simple one:

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THESE DOCUMENTS SONT LA PROPRIETE DE LA BIBLIOTHEQUE DE LA MAIRIE DE MONTREAL

* Journal Club 10/10/79 meeting

plainant is a performer and has been rendering services to the public at various theatres and other places of amusement for the past thirteen years; "that he has gained a vast amount of good will;" that the Marks Bros. Theatres, Inc., owned and operated the Granada Theatre in Chicago and knew the value of the services of the complainant as a performer; that it wilfully advertised the fact that complainant would appear at their theatre for the week beginning Monday, September 18th and ending on or about the 25th of September, 1927, when in truth and in fact the complainant had no contract to appear at that theatre; that Marks Bros. Theatres, Inc., knew that complainant was not employed to appear at their theatre, but they advertised the fact so as to prevent complainant from being employed at other theatres; that it well knew that other theatres would not employ the complainant if the defendant advertised that complainant was to appear at its theatre; that the defendant knew that the complainant was negotiating with another theatre company to appear at their theatre in Chicago during the same period of time mentioned in their advertisement; that the advertising was knowingly false and that complainant was prevented thereby from being employed by the other theatre who desired his services, and thereby complainant was damaged approximately \$5,000; that the complainant had told the defendant not to continue the advertising, but the defendant continued to do so; that the advertisements appeared in certain newspapers published in Chicago; that it was impossible for complainant to ascertain the amount of his damages on account of such wrongful advertising, and therefore he had no adequate remedy at law. The prayer of the bill is that the defendants be enjoined from continuing the advertising; that the injunction issue forthwith and without bond "for the reason that said advertising will continue until the time of hearing, and thereby cause your orator additional damage and that such injunction may issue without bond," and for an

accounting.

The issuing of an injunction without notice is forbidden by the statute "unless it shall appear from the bill or affidavit accompanying the same that the rights of the complainant will be unduly prejudiced. Sec. 3, Chap. 69, Revised Statutes. There is no allegation of fact contained in the bill of any kind that complainant would be injured if he gave notice of the application for the order. Counsel for the defendant argues that if notice were given, there would be a delay in having the order entered. Just how this would be brought about is not clear. Presumably it would take but a very short time to serve the notice, and we think it clear that the application for the order would not be delayed had notice been given. All of the decisions of this court and of the Supreme Court are to the effect that an order awarding a writ of injunction will not be sustained unless facts are made to appear that the complainant will be prejudiced if notice were given. There being no such showing in the instant case, the order appealed from is reversed.

REVERSED.

Hatchett, F. J., and McSurely, J., concur.

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61 - 31885

JOHN QUAN,

Appellant,

v.

ADOLPH G. ROSELL,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 23, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On May 18, 1926, the plaintiff, John Quan, obtained a judgment in the Municipal Court upon a lease and cognovit against the defendant, Adolph G. Rosell, for rent in the sum of \$350.00, that amount being made up of rent at \$60.00 a month for five months, and of \$50.00 attorney's fees. On May 20, 1926, an execution was issued thereon, and on June 1, 1926, returned no property found. On June 5, 1926, a garnishee summons was issued against the Sixty-Third & Related State Savings Bank, and on June 14, 1926, the garnishee answered, stating that at the time of the service it had on deposit to the credit of the defendant the sum of \$444.10. On June 14, 1926, an order was entered giving the defendant judgment against the garnishee, the Sixty-Third & Related State Savings Bank, in the sum of \$260.10 for the use of the plaintiff. On July 2, 1926, the plaintiff, John Quan, executed a satisfaction piece, acknowledging full satisfaction of the above mentioned judgment. On July 3, 1926, on motion of the defendant Rosell, supported by a verified petition, the judgment by confession was opened and leave given to the defendant to appear and make a defense, and it was ordered

Accepted 12 March 2006

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Volume 102, No. 1

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A. thymifolia was found in a new tract of habitat off of Highway 4

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© 2002 John Wiley & Sons, Inc. Journal of Management Education 26(10): 1139-1150, 2002

1. *Journal of the American Statistical Association*, 1990, 85, 1009-1014.

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... f. 101b To see and understand, and to return not at all.

Received 15 July 2004; accepted 15 July 2004

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In case you wish to change the name of your company or the address of your company, please inform us immediately.

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1. The first group of authors (e.g., [1, 2]) considers the problem of the stability of the motion of a system of particles in the field of a central force. The results of these authors are in qualitative agreement with the results of the present study.

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Continued on p. 24

that meanwhile the judgment should stand as security, and the petition be considered as the defendant's affidavit of merits.

The petition sets up, among other things, that the judgment was rendered by confession on a written lease for the third floor of the apartment known as #7744 So. Ada Street, Chicago, for a period from May 1, 1935 to May 1, 1936, at a rental of \$60.00 per month; that there were other tenants in the building who used the same entrance as the defendant; that about the latter part of May, the tenants occupying the second and third apartments across the hall from the defendant, began holding drinking parties about two and three times a week that would last until four and five o'clock in the morning; that "the screaming, noise and disturbance, cursing, swearing and obscene language used was such that it was impossible for the defendant and his family to sleep at night; that the parties began to grow and increase in volume until on or about November 20, 1935, when the defendant was obliged to vacate the apartment;" that on numerous occasions the police patrol and police flivver squad were obliged to call and quell the disturbances and restore quiet; that the defendant and his wife complained continually to Elmore & Company, agent of the building, and to the janitor, but that nothing was done to remedy the condition; that the speaking tube in defendant's apartment was never in service and was never repaired, although the defendant frequently asked that it should be put in order; that on or about November 1, 1935, the agent of the building was notified that on account of the noise and disturbance caused by the said "drinking

They considered the judgment should stand as such, and
the petition be dismissed as the defendant's affidavit is
correct.

The petition sets up many other things, that the
judgment was rendered in violation of a certain law of
the State that at the defendant's house on 177th St. and 12th
Avenue, for a period from 1st, 1902 to 1st, 1904, as a
result of 1881, 1902 and 1903; that there were other persons in
the building who used the same address as the defendant;
that about the latter part of 1904, the tenants occupying
the second and third floors of the building moved the first floor the
interior, before building started within about two and
three years a work that would have cost two and five dollars
at the present time; that the defendant, owner and defendant,
occupying, occupying and occupying houses and that that is
not possible for the defendant and his family to show it
right that the defendant would occupy and occupy in which
about on or about December 22, 1904, that the defendant was
obliged to vacate the apartment; that on January 1905
the parties moved and moved 113th Street and moved to
and the defendant and defendant and defendant and that the
defendant and the defendant's apartment in 1905 was a
house, about at the building, and to the building, but that
building was used in 1905 and 1906; that the defendant
was in defendant's apartment and that it existed and was
known recently, although the defendant's apartment was
it should be and the building was on or about December 1, 1904,
the owner of the building was notified that on account of
the time and defendant moved by the defendant.

debauches," rendering it impossible for the defendant and his family to sleep at night, and for the other reasons mentioned, he would vacate the premises before December 1, 1925; that accordingly, on or about November 20, 1925, he moved from the building; that he paid the rent for November, 1925; that the condition above described amounted to a constructive eviction under the law.

There was a trial before the court without a jury, and on November 19, 1926, an order entered vacating and setting aside the judgment by confession of May 18, 1926, and a judgment entered that the plaintiff take nothing by his suit, and that the defendant recover his costs. This appeal is from that judgment.

At the trial there was evidence introduced on behalf of the defendant in an effort to show that the conduct of the various tenants occupying apartments in the building near that of the defendant was such as to make the defendant's apartment, according to the claim of the defendant, practically uninhabitable. The evidence for the defendant consisted of his own testimony, that of his wife, and Mrs. Troutman, a tenant. The apartment building in question was U-shaped, and contained thirty-three apartments. The defendant vacated the premises on November 21, 1925, having paid the rent up to the end of that month. The lease by its terms, did not expire until April 30, 1926, and from November, 1925, to May, 1926, the apartment in question was vacant, although the evidence shows that the representative of the plaintiff made reasonable efforts to get a tenant for it.

1941; that the committee never discussed whether to a
down from the following that he said was from the President
1941; that accordingly, he is aware that on 1941, he
testimony, he would want the committee before December 1,
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is the total amount of the various payments made by the various persons mentioned in the foregoing report. The total amount of the various payments made by the various persons mentioned in the foregoing report is \$1,000.00. The total amount of the various payments made by the various persons mentioned in the foregoing report is \$1,000.00.

The evidence of the defendant, himself, is, substantially, as follows: that the building in question, at 7744 South Ada Street, Chicago, is U-shaped, and that his apartment was on the third floor on the north side of the U, having an entrance in a court about forty feet back from the street; that there were three entrances to the building; that about the latter part of May or the first of June, 1935, big noisy parties at which women screamed and yelled, took place, from two to three times a week, beginning about 10:00 or 11:00 o'clock in the evening and lasting until early in the morning; that they took place in the apartments of the tenants named Van Brumer and Kenny, who lived practically across the hall from him on the second and third floors, the entrance to one of the apartments being not over eight feet from his; that sometimes the screaming and yelling came from Van Brumer's and sometimes from Kenny's flat; that in the apartment on the second floor all kinds of profane language was used; that the noise and "racket" occurred from one to three times a week throughout the whole period he was there, that is, until he moved; that in the middle of the summer he saw someone in the second apartment in an intoxicated condition; that at times police officers came up and knocked on the door, and the noise would stop and the lights go out, and the police officers then would walk around and ring the various bells; that after the officers left, the tenant and the guests would go back to the flat and the disturbance would continue throughout the night; that there were at times, from six to ten persons in that apartment who would holler, scream and swear until close to three o'clock in the morning;

[illegible]

that he saw persons going in and out of the two apartments who were intoxicated; that sometimes when he went to work in the morning he saw broken bottles in the front hall; that there was always a lot of automobiles around; that the police called at the apartments in question at least six or seven times between May 1 and November 20; that he complained to the plaintiff about the speaking tube, which was never in order, and which was never repaired; that his wife paid the rent for the apartment pursuant to his direction; that he directed his wife to notify the agent about the disturbance in the apartments, and that if something was not done they would move out. On cross-examination, he testified that although the policemen called on a number of occasions, they never arrested anyone; that he himself was never in the apartments of Van Bramer and Kenny while the parties were going on, and that he was never in a position where he could see what was going on. The evidence of his wife was to the effect that she lived with her husband in the apartment in question; that she always paid the rent at Zimmer's office at her husband's direction, that every month, beginning in July, her husband directed her to notify Zimmer about the conditions in the apartments; that she told Zimmer they could not stand the noise, that hearing the screaming and yelling woke them up in the middle of the night; that Zimmer said it was no worse for her than for anyone else; that she did not know whether she had that conversation in July or in September; that she also spoke to him in August when she paid the rent, and told him that the parties would have to stop, or they would have to move; that about the first of November she told

Zimmer they would vacate the apartment by the first of December; that they paid the November rent, and then moved out of the apartment. On cross-examination, she testified that at that time she asked Zimmer if he would allow her and her husband to keep their furniture there, that her husband had to go down to Florida on account of business; that if Zimmer would do so they would stay the next year. When asked, "What was the reason that you wanted to leave the apartment?" she answered, "Because we could not afford to pay for the flat," but on motion of counsel for the defendant, the answer was stricken. When, however, she was asked, "Do you mean that you wanted to keep the apartment?" she answered in the affirmative; and when asked, "Although there was noise there?" she answered, "We thought this way, that it would be the best that we pay the rent until spring." She further testified, when asked the question where she would have been living in the meantime, that she would have gone with him to Florida, "but we could not afford to pay both rent and board at two places." When asked, "What was your reason for wanting to leave the flat, because of the noise or because you wanted to go to Florida?" she answered, "Because of the noise."

It is the evidence of Zimmer, the agent for the plaintiff, that on September 1, 1935, Mrs. Rosell, the wife of the defendant, paid the rent; that on that occasion she complained of the condition of the speaking tube; that he told her that they would take care of it; that it was later fixed, and used in his and her presence; that she, also, complained that five or six tiles were out of the bath-room floor; that he told her he would have that repaired, al -

though she said not to mind it as it did not amount to much; "that they were going to Florida for the winter, and that they would like to keep their things in the apartment over the winter, and not put them in storage, and that they would be there about five months, and if he would allow them two months out of the five, they would pay the other three months and also take a further five month lease until the fall of 1936;" that she never complained about noise or drinking parties in the building; that when she asked for two months' concession he told her he would do all he could for her and would let her know; that he then took the matter up with Quen, the owner, who said he could not do it; that he then went to her and told her it was impossible to do it, and that she said, "I am going to move;" that that was about the 7th or 8th of November, 1935. On cross-examination, he testified that he had indirect knowledge from various tenants as they paid their rent, that the police went to the building and rang some of the bells, but they did not find any disturbance; that he himself never had any knowledge of unusual noise or drinking parties in the building.

It is the evidence of the witness Van Brumer, called for the plaintiff, who occupied an apartment directly across the hall on the same floor as the defendant, from the first of June until sometime in November, 1935, that there never were, and he never heard of, any drinking parties, loud noises, disturbances or quarreling in his apartment, and never heard of any complaint by the defendant or his wife; that on one occasion some police officers came up and asked if there was any noise; that he told them he did not know of

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any, that they could come into his apartment and look around. On cross-examination, he testified that he knew the people that lived below, and knew that they had guests there, but no wild parties.

Considering all the evidence, it is quite obvious that the defendant failed sufficiently to prove a constructive eviction. That condition created by a landlord or with his sanction which results in a constructive eviction has sometimes been called a "nuisance". In Tiffany on Landlord and Tenant (Vol. 2, p. 1282), the law, in general, is stated to be as follows:

"There may be, it has been held, an eviction of the tenant of part of a building if he is compelled to leave by the use of other parts of the building, with the landlord's consent, for purposes of prostitution or gambling, or for other purposes calculated to cast discredit upon tenants of the building, and to render it an unfit place for residence or the conduct of business. (Gyett v. Hendleton, 8 Cow. (N.Y.) 727). Such use may be by the landlord himself, or by other persons with his permission, during his possession of such other parts, or it may be by persons to whom he has leased such other parts with knowledge that they will make use thereof. * * * Such improper use of adjoining premises by other tenants of the same landlord is not, however, sufficient to constitute an eviction, although followed by the tenant's abandonment of possession, if the landlord had no reason to suspect, at the time of making the lease to them, that they would be guilty of such improper use, he having no greater power than the tenant subsequently to prevent it." (Gould v. Benmore, 57 Ill. App. 591.)

In Kistler v. Wilson, 77 Ill. App. 143, the court said,

"The act of the landlord to constitute an eviction must be of a grave and permanent character and 'done' for the purpose and with the intention of depriving the tenant of the enjoyment of the demised premises." Citing Hayner v. Smith, 83 Ill.

and they will have the same effect as if they were
in the hands of the enemy.

1st and 2nd (Vol. 1, p. 128), the 1st, in general, is

"I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you. I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you.

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On 11/11/50, the following was received from the
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430; Lynch v. Baldwin, 69 Ill. 310; Morrison v. Tilloch, 81 Ill. 607, 623.

Generally, what is done to constitute a constructive eviction must be something done on the premises by or with the consent of the landlord, and be in its nature a nuisance, thus depriving the tenant of the beneficial use of the premises. If the landlord lets the premises for a purpose that will not necessarily result in a nuisance, but which becomes so only because of the negligence or wrongful acts of the tenant, generally there is no eviction. An eviction cannot be predicated merely on the ground of a nuisance created by a stranger. In a case like the present one, where the chief complaint is noise, the obligation is on the tenant to show that the acts proceeded from the landlord himself, or existed by reason of his connivance or consent, that is, the disturbance or nuisance must be the work of the landlord, as he is not responsible for the general misconduct of third parties. If he is not instrumental in the creation or the continuance of the nuisance, the plea of constructive eviction is not made out.

All that is recited in the evidence here as to the existence or non-existence of the nuisance pertains to unnecessary noise and the presence of certain guests, and what is claimed to be disturbances in neighboring apartments. The building contained thirty-three apartments. Necessarily, in the normal order of things, there would be, from time to time, in such a building, a large number of people made up of tenants and their guests, which might result in considerable noise and disturbance that would be obnoxious to some of the

many tenants. Noise, of course, may easily become a nuisance. Considering the evidence as shown by the record in this case, however, we do not feel that it discloses such a state of what might be called disorderly conduct, that is by the way of noise, or otherwise, as would justify considering it as establishing sufficient ground for vacating the premises and extinguishing the tenant's obligations under the lease; in other words, as constituting, in and of itself, a constructive eviction.

Further, the testimony of the wife of the defendant who acted as his agent in the payment of the rent, is such that it seems quite probable that the defendant vacated the premises not because of the alleged nuisance, but because of the desire to avoid in part, at least, the future rental obligations of the lease.

Also, the defendant failed to prove, by a preponderance of the evidence, that the landlord, either expressly or impliedly, sanctioned the alleged misconduct of the other tenants. For the defendant, emphasis is placed upon the case of Martenbauer v. Brumbaugh, 230 Ill. App. 326, but in that case the evidence showed that the landlord knew that parts of the premises were used for purposes of prostitution.

In our opinion, the judgment of November 19, 1926, that the plaintiff take nothing by his suit is manifestly against the weight of the evidence. That judgment, therefore, is reversed and judgment entered here in favor of the plaintiff in the sum of \$350.00 and costs.

79 - 31687

CHARLES J. RUSSELL, Assignee of
HEALTH INSTITUTE, Incorporated,

Appellant,

v.

WILLIAM BILLOH,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 23, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion
of the court.

On September 21, 1925, the plaintiff, Health
Institute, Incorporated filed its statement of claim in
the Municipal Court of Chicago, alleging that there was
due from the defendant, William Billoh, the sum of \$318.00,
for medical attendance, advice and medicines given and
furnished at the special instance and request of the defend-
ant. The statement of claim also recited that there was
was due the plaintiff from the defendant the sum of \$318.00
upon an account stated between them on April 28, 1925.

On October 22, 1925, an order was entered by the
court, giving the plaintiff leave to increase the ad damnum
to the sum of \$418.00.

On March 15, 1926, an order was entered restoring
certain lost files. The lost files were stated, in an
affidavit by the attorney for the plaintiff, to be one alias
summons and three pluries summons.

On April 2, 1936, the defendant was duly served with a summons, and with a precept, with the statement of claim and affidavit attached thereto.

On April 7, 1936, the defendant William Dillon, entered his appearance, and on April 8, 1936, on motion of the defendant, it was ordered that the time to file an affidavit of merits be extended ten days from April 8.

On April 20, 1936, the defendant filed an affidavit of merits, in which he set forth that he was not indebted to the plaintiff in the sum of \$418.00, or any sum whatever for medical attendance, advice and medicines, and denied therein that he had an account with the plaintiff on May 15, 1925, which he had agreed and promised to pay.

On November 3, 1936, an order was entered, which is, in part, as follows:

"Now comes the plaintiff in this cause, the defendant being absent and not represented and thereupon this cause comes on in regular course for trial before the Court without a jury, and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises, enters the following finding to-wit:

The Court finds the issues against the defendant William Dillon, and assesses the plaintiff's damages at the sum of four hundred eighteen and 00/100 Dollars (\$418.00).

This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendant, William Dillon, the damages of the plaintiff amounting to the sum of Four Hundred Eighteen and 00/100 Dollars (\$418.00) in form as aforesaid assessed, together with the costs by the plaintiff herein expended and that execution issue therefor."

On November 8, 1936, the original plaintiff, Health Institute, Inc., sold and assigned its judgment to one

On April 6, 1900, the following was sent to the
State Department, Washington, D.C.
The following is a copy of the letterhead of the
State Department, Washington, D.C.

On April 7, 1900, the following was sent to the
State Department, Washington, D.C.
The following is a copy of the letterhead of the
State Department, Washington, D.C.

On April 10, 1900, the following was sent to the
State Department, Washington, D.C.
The following is a copy of the letterhead of the
State Department, Washington, D.C.

On April 11, 1900, the following was sent to the
State Department, Washington, D.C.

The following is a copy of the letterhead of the
State Department, Washington, D.C.

The following is a copy of the letterhead of the
State Department, Washington, D.C.

The following is a copy of the letterhead of the
State Department, Washington, D.C.

The following is a copy of the letterhead of the
State Department, Washington, D.C.

Charles J. Russell.

On December 31, 1926, Samuel L. Cohen, attorney for the defendant, served notice on the plaintiff, and on December 22, 1926, he moved to vacate the judgment entered on November 3, 1926. Attached to the order was a petition, signed and sworn to by the defendant.

The petition recites, among other things, that on December 16, 1926, an execution was served upon him, the defendant, and that the execution gave him the first knowledge he had that a judgment had been entered against him; "that on said November 3, 1926, he was physically unable to appear in court to defend the above suit; that on said date he was under the care of a physician for the treatment of a severe cold;" "that he has used due diligence in presenting this petition immediately after the service of said execution;" that he has a good defense to this suit upon the merits to the whole of the plaintiff's demand; that his defense is that he is not indebted to the plaintiff in any sum whatever for medical attendance, advice and medicines furnished by the plaintiff, and that at no time did he admit that he owed the plaintiff the amount set up in the plaintiff's statement of claim; that the plaintiff caused to be filed two statements of claim, the first dated September 21, 1926, alleging that the defendant was indebted to the plaintiff in the sum of \$318.00; and the second, filed March 13, 1926, alleging that the defendant was indebted to the plaintiff in the sum of \$418.00.

On December 22, 1926, the court granted the motion of the defendant and vacated the judgment entered

against the defendant on November 3, 1936. This appeal is from the order vacating that judgment.

As the motion to vacate was not made "within thirty days after the entry of such judgment," (Chap. 37, Sec. 409, Cahill's Rev. Stats. of Ill. 1927) it could not legally be vacated, save by appeal or writ of error, or by a bill in equity, or "by a petition to said Municipal Court setting forth grounds for vacating, setting aside, or modifying the same, which would be sufficient to cause the same to be vacated, set aside, or modified by a bill in equity," and the question, therefore, arises whether the grounds set forth in the petition are sufficient.

No brief has been filed on behalf of the defendant. In our judgment, the facts alleged in the petition of the defendant were insufficient to warrant the trial judge in vacating the judgment. On April 2, 1936, the defendant was duly served with a summons, and on April 7 entered his appearance, and, on his motion, on April 8, it was ordered that the time to file an affidavit of merits be extended ten days; and on April 20, he duly filed his affidavit of merits. When, therefore, on November 3, 1936, the cause was reached and duly tried, even though in the absence of the defendant, and without his being represented, judgment was then properly entered against him. That being the state of the record, at that time, it is our judgment that the defendant's representations of facts in his petition of December 16, 1936, in support of his motion to vacate, should be such as, if taken to be true, would show that the judgment was inequitable, as the result

of fraud, accident or mistake, and was not due to any negligence on the part of the defendant; Price v. Marie, et al., 307 Ill. App. 113; American Surety Co. v. Bliss, 314 Ill. App. 483; Gallay v. Mathis, 195 Ill. App. 170. The defendant in his petition stated that "he was physically unable to appear in court to defend the above suit; that on said date he was under the care of a physician for the treatment of a severe cold." The statement of the defendant that he was physically unable to appear in court is merely a statement of his opinion. If he had been examined by a physician and had stated the fact in his petition, and that the physician, naming him, had certified that he, the defendant, was physically unable to appear in court, and had attached the certificate to the petition, it might have been sufficient for the court, considering the matter in an equitable way, to exercise its discretion in his favor. In our judgment, what is stated in the petition as to his physical condition and his health is altogether too general. We know of no case which holds that such generalizations and such mere matters of opinion without more, are sufficient, in and of themselves, to establish such an equity in the defendant's favor as to justify a trial judge, in the proper exercise of a sound discretion, to vacate a judgment.

In our opinion, the court was without jurisdiction on December 32, 1936, to enter an order vacating the judgment of November 3, 1936. That order, therefore, vacating the judgment entered against the defendant, William Dillon, for \$419.00, will be reversed and the cause remanded with

of blood, according to statistics, and was not the only
 explanation on the part of the defendant. **WILLIAM W. HARRIS**
 of St. Louis, Mo., Jan. 11, 1911; **AMERICAN MEDICAL ASSOCIATION**
 1222 N. W. 11th St., St. Louis, Mo., Jan. 11, 1911.
 The defendant in his petition stated that the two physicians
 named in support of him had been with him
 up to the time he was under the care of a physician for the
 treatment of a urinary ailment. The defendant of the petition
 was that he was physically unable to appear in court in
 person, a statement of his counsel. It has been explained
 by a physician and had stated the facts in his petition, and
 that the physician, named him, had certified that he,
 defendant, was physically unable to appear in court, and
 has requested the court to appoint a physician, if it
 has been satisfied that the facts, submitted by the
 defendant, are as stated, and to appoint the physician in his favor,
 as an equitable way, to remove the defendant from the
 hospital, and to order in the petition on the
 physical condition and his health is dependent on the
 up to him of an order which shall have been submitted
 and with the aid of medical attention, and with
 in and of defendant, to establish such as to be
 defendant's favor as to possibly a trial judge, in the event
 of a second hearing, to remove a judgment.

In the petition, the court was asked to appoint
 an attorney, to appear on behalf of the
 defendant, and to order the removal of the
 defendant from the hospital, and to order the
 removal of the defendant from the hospital, and to order
 the removal of the defendant from the hospital, and to order

-6-

directions to expunge the order of December 22, 1958
from the record.

REVERSED AND REMANDED WITH DIRECTIONS.

HOLDOM AND WILSON, JJ. CONCUR.

Attention is drawn to the fact that the

from the town.

There is no doubt that the

There is no doubt that the

118 - 31726

GERA F. YEMMER,

Appellee,

v.

JOHN H. KARLSON, et al
On appeal of JOHN D. ROWE,
Receiver,

Appellant.

APPEAL FROM

SUPERIOR COURT,
COOKE COUNTY.

Opinion filed Nov. 23, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion
of the court.

This is an appeal by a receiver, John D. Rowe, appointed by the court in a proceeding to foreclose a mortgage, from a decree of the Chancellor entered on January 31, 1927, which ordered him to pay to the complainant, Gera F. Yemmer, forthwith, to apply on a deficiency decree in her favor, the sum of \$551.19, and provided that if the receiver made that payment, a certain rule to show cause would be dismissed without any punishment being imposed.

In our judgment, the order of the court appealed from - which orders him to pay over as receiver a certain amount of money to a particular party to the litigation, and if he does so, he shall be relieved, without punishment, from a rule to show cause, - is interlocutory.

Evidently, it was the intention of the Chancellor to give the receiver an opportunity to pay over the money forthwith, and meanwhile to hold over him the rule to show cause. The order so made may have been entirely justifiable,

[Faint handwritten notes]

— 22 —

• *Trifolium repens*

IN THE SUPREMACY OF THE
COURT OF THE STATE OF NEW YORK
IN SENATE

• *Staphylococcus aureus*

Opinion filed Nov. 22, 1927.

but it was not final. In Sergomb v. Catlin, 36 Ill. App. 194, the court said,

"There is no final judgment on this finding. He is directed to dismiss the suit of the company or show cause why he should not be punished for failing to do so. He may show ample cause, but if he shall not do so, yet it cannot be said that there is any final judgment against him. There is no fine imposed, no imprisonment ordered. The judgment of the court on this contempt is as yet unspoken. The order is purely interlocutory and determines nothing finally as against the plaintiff in error. It is not, therefore, subject to review on error or appeal, and it follows that the writ of error must be dismissed."

Likewise, in the case of McKuen v. McKuen, 55 Ill. App. 340, the court held that an order lacking the element of directing punishment, either by fine or imprisonment, is not a final order, but purely interlocutory and not reviewable. In Grane v. Jewett, 73 Ill. App. 158, the court said, concerning an order directed to a receiver,

"It amounts merely to an order to surrender the custody of the fund to another officer of the court, viz. the clerk, and concludes with an intimation that if the order be not complied with by a day certain the court will then treat the receiver as in contempt. That in such event another order fixing the manner and term of commitment would be necessary, seems evident, and that such further order, and not this order, would be the final order of commitment, seems equally clear."

Other cases illustrating the subject are the following:

Ertl v. Lehmann, 178 Ill. App. 38;
Balton v. Zimmer, 131 Ill. App. 490.

For the reasons stated, it follows that the order appealed from not being final, and therefore not subject to review, the appeal must be dismissed.

APPEAL DISMISSED.

HOLDEN AND WILSON, JJ. CONCUR.

THE UNIVERSITY OF CHICAGO

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1863. It is a very long letter, and it contains a great deal of information about the state of the country at that time. It is a very important document, and it is one of the most interesting documents in the collection.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

[illegible][illegible][illegible]

THE UNIVERSITY OF CHICAGO

137 - 31747

GREENFIELD BROTHERS CLOTHING CO.,)
a corporation,)

Appellee,)

APPEAL FROM

v.)

MUNICIPAL COURT

H. A. KANSTEINER,)

OF CHICAGO.

Appellant.)

Opinion filed November 23, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

This is a fourth class action brought in the
Municipal Court on May 13, 1926, by the plaintiff, Greenfield
Brothers Clothing Co., against the defendant, H. A. Kansteiner,
for an alleged debt of \$45.80 for goods sold and delivered in
the fall of 1921.

On January 3, 1927, a judgment, by default, was
entered in favor of the plaintiff.

On January 13, 1927, a motion by the defendant
to vacate and set aside the default and judgment of January
3, 1927, was overruled.

On January 14, 1927, another motion by the defendant
to vacate and set aside the default and judgment was over-
ruled. This appeal is from that order.

No brief has been filed on behalf of the plaintiff.

The transcript of record is per praecepto, and
contains copies of four affidavits, one each by the two

1. The first part of the document is a list of names and addresses, which are arranged in two columns. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "J. M. Smith", "J. M. Jones", and "J. M. Brown", along with their respective addresses in various cities and states.

44-38861-1070 (PAGES 1070-1071)
FROM SAC TO DIRECTOR

THE UNIVERSITY OF CHICAGO

[Faint, illegible text at the bottom of the page]

...the ... of the ...

Printed at the Government Printing Office, Ottawa, Canada.

and, by means of it, to ensure the independence of
our act of doing good, without any other motives.

members of the firm of Carpenter & Grant, attorneys for the defendant, and two by the defendant. Two of the affidavits, one by Grant and one by the defendant, were used in support of the motion of January 13, to vacate the judgment, and two of them, one by Carpenter and one by the defendant, were used in support of the motion of January 14, for a similar purpose.

We have examined the affidavits and do not feel justified in concluding that the trial judge erred in refusing to vacate the judgment. The matter was evidently before the trial judge twice, and on both occasions he refused to grant the motion to vacate. The gravamen of the affidavits in support of both motions is, in reality, an admission of a lack of diligence. The mere fact that the attorneys for the defendant had three cases on call in the Municipal court at 9:30, and one case on call in the Circuit Court at 10 o'clock, and one case on call in the Probate court at the same hour, is no justification, in and of itself, for a failure to be present before the trial judge in this case when it was called.

To recognize and give effect to the defendant's claim for a vacation of the judgment, based on the grounds set forth in the affidavits, would be a dangerous precedent, and tend to still more delay in the administration of justice.

The judgment will, therefore, be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

in support of the action of the Board of Directors in the matter of the proposed merger, and in the event of a merger, to support the action of the Board of Directors in the matter of the proposed merger, and in the event of a merger, to support the action of the Board of Directors in the matter of the proposed merger.

to have examined the affidavits and to not have
 furnished in concluding that the trial judge acted in violation
 to vacate the judgment. The matter was evidently before the
 trial judge twice, and on both occasions he refused to grant
 the motion to vacate. The grounds of the affidavits in
 support of both motions is, in verbatim, an admission of a
 lack of diligence. The case law that the attorney has
 furnished and those made on call in the attorney's office
 as well, and was made on call in the attorney's office as in
 and was made on call in the attorney's office as in
 in no jurisdiction, as and of itself, but a failure to be
 concerned between the trial judge in this case and it was called.

[illegible]

1990/1991, 1991/1992, 1992/1993, 1993/1994, 1994/1995

1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 26

395 - 31527

HARVEY B. GAINES,

Appellant,

v.

ISAAC GITELSON,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed November we, 1927.

MR. JUSTICE HOLCOM delivered the opinion of the court.

This is an action brought on a lease of an apartment in a building at number 1030 Hyde Park Boulevard, Chicago. It is for rent for the months of October, November and December, 1925, and January 1926, at the rate of \$130 monthly, plus \$50 attorney's fees. The lease contained a power to confess judgment for any rent due, and on January 28, 1926, a judgment thereon for the four months' rental, aforesaid, with \$50 attorney's fees, was entered by confession for \$570. That judgment was opened on the motion of defendant, and he was let in to plead, in the meantime the judgment standing as security for the debt.

On a trial before court and jury there was a judgment for the defendant.

Defendant urges for affirmance that he was constructively evicted from the leased premises; that his lease was surrendered with the consent of the plaintiff by parol.

2461A.058

Page - 10

STATE OF NEW YORK	IN SENATE
January 1, 1927.	
REPORT	OF THE
COMMISSIONER OF THE LAND OFFICE	
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE	
APRIL 1, 1926.	

Opinion filed November 26, 1927.

THE COMMISSIONER OF THE LAND OFFICE

TO THE SENATE

That in an action brought on a writ of habeas corpus

and in a writ of habeas corpus the writ was granted.

It is the duty of the court to determine whether

the writ was granted, and the writ was granted.

It is the duty of the court to determine whether

the writ was granted, and the writ was granted.

It is the duty of the court to determine whether

the writ was granted, and the writ was granted.

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It is the duty of the court to determine whether

the writ was granted, and the writ was granted.

It is the duty of the court to determine whether

the writ was granted, and the writ was granted.

It is the duty of the court to determine whether

the writ was granted, and the writ was granted.

Plaintiff challenges the force of these contentions and urges for reversal that there was no constructive eviction of defendant, and that there was no legal surrender of his lease.

The facts are not complicated. They are substantially that the apartment leased by defendant was in a new building containing 33 apartments; that in due time he moved into the apartment which he leased; that on June 4, 1935, in the inside entrance to the floor on which his apartment was, he was by a robber despoiled of \$3500. which the robber took from his person; that the robber had gained access to the inner entrance because, as he says, the inside hall door was carelessly and negligently left unlocked; that on the following morning he requested the agents of defendant to place an iron protection over the two glass panels 5 inches x 10 inches, in the door entering into defendant's apartment from the hall; that he feared burglars would enter through the glass panels unless the iron protection was installed, and that thereafter on August 16, 1935, in the absence of defendant and his family burglars did enter his apartment and carried away therefrom his property to the value of \$4,000, and that the burglars obtained entrance by breaking the small glass panels; that defendant charges negligence against plaintiff for not providing the iron protection requested by defendant, and he also charges that the lights in the front hall and the front court of the apartment building were not kept burning, this in defiance of a city ordinance and of his request; that he had a conversation with one of the agents of the building, in which

[illegible]

The fact was not admitted. They are not
 essentially what the specimens listed by Debevoise and in a
 new bulletin containing 33 specimens; that is the opposite
 must have the specimens which he listed. This is true.
 But, as the latter authors in the list on which the
 name was, he was by a certain number of figures, which he
 referred from their list. The number was given
 known in the lower section. However, in 1911, the
 fact that was originally not sufficiently fully explained
 that on the following evening he presented the results of
 his studies to show on their position with the two
 groups. It is known, in the first instance, that
 Debevoise's specimens from the hills; that he found
 which were through the same fossils which the two
 sections are identical, and the specimens are about 10,
 15, in the number of specimens and the fossils
 all under his specimens and having many others. His
 party to the west of St. Louis, and that the fossils
 evidence by showing the well known fossils that
 various specimens which are not
 from Debevoise's specimens by Debevoise, and he also
 that the fossils in the lower hills and the lower part of the
 specimens which were not found, and he also
 of a city and the fact of the fossils; that he had a
 section of the fossils of the hills, in which

he offered to pay the rent, \$130, for September 1935 in full satisfaction of any further rent which might accrue under the lease, and that on October 14th thereafter he did send a check for said \$130 to plaintiff's agents, and that the agents said that they were willing to release him from the lease.

It is hard for us to understand how the landlord can be blamable and legally liable for defendant's loss of \$2800 at the hands of a holdup man, or that the plaintiff was responsible for some one burglariously entering his apartment during his absence and carrying away \$4,000 of his property. It is no where in evidence that the hallway entrance of the door entering the apartment, which defendant leased, was in any different condition or position than it was when he rented the apartment and signed the lease therefor. The landlord was not bound to make structural changes in the building at the request of the tenant. The acts aforesaid did not in our judgment constitute a constructive eviction.

The contention of the defendant that there was an agreement between himself and the agents that the lease should be surrendered on the payment of the September rent is denied, and there is cogent documentary evidence supporting such denial.

On August 22, 1935, defendant wrote the plaintiff's agents as follows:

" Will you please sub-lease third apartment, 1030 Hyde Park Boulevard, now occupied by me. You can have possession Tuesday, Sept. 2nd, 1935. By giving this attention you will confer a favor."

be fit and to pay the bond, \$100,000, the corporation will be held responsible for the same. The corporation will be held responsible for the same. The corporation will be held responsible for the same.

It is in fact the only one of its kind in the world. It is a unique and valuable source of information on the history and development of the world's great religions. The book is a masterpiece of scholarship and is a must-read for anyone interested in the history of religion.

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The agents replied to this under date of September 1, 1925, in which they stated that they had a proposition to rent the apartment for the balance of the term April 30, 1926, for which they were offered \$125 a month from October 1, 1925, and they stated if the proposition was accepted defendant would have the following payments to make in settlement, viz., September rent, \$70 difference between his rent and that offered by the proposed sub-tenant, and the Real Estate Board charge of \$52.40 for transferring the lease. The record is silent as to defendant's making any reply to this letter.

There is no evidence in the record that the agents had any authority from plaintiff to accept a cancellation of the lease, and without such authority the rent collecting agents would have no right to consent to the cancellation of defendant's lease.

In Morris v. Taylor, 190 Ill. App. 528, it was held as a matter of law that "the agents could not without express authority from their principal change any provision of the lease", and in that case as in this "such authority was not proven."

In Morgan v. Cook, 213 ibid 172, the court said "in Wayner v. Smith, 63 Ill. 430, the court approved of the rule that a constructive eviction must be 'something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.'" This is reasserted in Keating v. Springer, 146 ibid 481; Barrett v. Heddle, 156 ibid. 479,

The evidence presented in this matter was of sufficient
weight, as shown by the fact that the jury found in favor of the
plaintiff and awarded him the sum of \$10,000. The fact that the
jury found in favor of the plaintiff is a strong indication that
the evidence presented was of sufficient weight to warrant such a
verdict. The fact that the jury found in favor of the plaintiff
is a strong indication that the evidence presented was of sufficient
weight to warrant such a verdict. The fact that the jury found in
favor of the plaintiff is a strong indication that the evidence
presented was of sufficient weight to warrant such a verdict.

There is no evidence in the record that the plaintiff
has any authority from the state to collect a tax. The fact that
the plaintiff has no authority from the state to collect a tax is
a strong indication that the plaintiff is not entitled to the
sum of \$10,000. The fact that the plaintiff has no authority from
the state to collect a tax is a strong indication that the plaintiff
is not entitled to the sum of \$10,000.

In *Smith v. Smith*, 100 Ill. 2d 100, 101, 102, 103, 104, 105,
the court held that the plaintiff was not entitled to the sum of
\$10,000. The court held that the plaintiff was not entitled to the
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the court held that the plaintiff was not entitled to the sum of
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and Hubens v. Hill, 813 ibid 583, and as said by Mr. Justice McMurtry in Morgan v. Cook, supra, so we say here, "applying this rule to the circumstances of this case, it cannot reasonably be claimed that any conduct of the landlord indicated any intention to deprive defendant of such enjoyment."

The order appealed from was in the following words:

"Judgment entered on the verdict of the jury, that the judgment against the defendant by confession of January 28, 1926, be vacated and set aside and that the defendant have and recover from the plaintiff his costs expended and that execution issue therefor."

The judgment last quoted is reversed and the cause is remanded to the Municipal Court with instructions to expunge that judgment from the record of the Municipal Court, and to reinstate and put in full force and effect the judgment against the defendant by confession of January 28, 1926.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P. J. AND WILSON, J. CONCUR.

69 - 31674

EDWARD J. ROUVILLE, a minor by
Charles Rouville, his next friend,

Appellee,

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

v.

RIVERVIEW PARK CO. (A corporation),

Appellant.

Opinion filed Nov. 23, 1927.

MR. JUSTICE HOLBOM delivered the opinion of
the court.

This case and No. 31675, Horace G. Gurley, a
minor, by Jennie T. Gurley, his next friend, v. appellant,
were tried as one case in the Superior Court, and the
verdict and judgment are for \$8,000 in each case, and in this
court the two cases have been consolidated for hearing
and have been heard upon one record, one abstract, and
one set of briefs, so that this decision is applicable to
and becomes the decision in each case. The foregoing
status is created by the agreement of all the parties.

The declaration in each case consists of three
counts. The first charges that on June 30, 1925, defendant
owned and conducted an amusement park in Chicago, and that
one of its departments was called the "Bug House"; that
the public were invited to the Park, including the "Bug
House"; that on June 30, 1925, plaintiff, who was a member
of the public, entered the Park and "Bug House" at defend-
ant's invitation; that while plaintiff was in the "Bug

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Opinion filed Nov. 23, 1957.

Mr. Justice: I have delivered the opinion of

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and because the decision in each case. The foregoing
statute is created by the enactment of all the parties.
one set of parties, so that this decision is applicable to
all cases both past and present, and constant, and
must for the future have been considered for setting
verdict and judgment are for \$5,000 in each case, and in this
were filed as one case in the Superior Court, and the
first, by Dennis T. Murphy, his next friend, a complaint,
This case and No. 21072, known as Murphy, v.

The resolution in each case consisted of three counts. The first charges that on June 30, 1935, defendant owned and conducted an amusement park in Chicago, and that one of its departments was called the "Big House"; that the public were invited to the park, including the "Big House"; that on June 30, 1935, defendant, who was a member of the public entered the park and "Big House" at defendant's invitation; and while defendant was in the "Big

House" in the Park, the defendant, by its servants, etc., who were acting within the scope of their employment, with force and arms, made an assault upon the plaintiff, and wantonly and maliciously struck, beat, bruised, wounded and ill-treated him. The second count was substantially the same as the first in its averments with the addition that the defendant then and there imprisoned the plaintiff, and detained him in prison or elsewhere without reasonable or probable cause. The third count in its inducement was substantially the same as the first and second, with a specific averment that defendant imprisoned plaintiff in said "Bug House" and elsewhere in said Park for the space of one hour, and forced plaintiff from said Park into the public street and to go into and along diverse public streets to a certain police station in Chicago, and there imprisoned and detained plaintiff at said police station without any reasonable or probable cause, and that thereby the plaintiff suffered serious injuries as alleged.

To this declaration defendant filed four pleas, - first, the general issue; second, self defense, and third, alleging that plaintiff made a great noise and disturbance against defendant's will, and greatly disturbing and disquieting defendant's patrons wit in the said "Bug House"; that defendant requested plaintiff to cease such disturbances and to depart from said "Bug House", and the plaintiff refused so to do, and that thereupon defendant in defense of its possession of its "Bug House", by its servants, laid hands upon plaintiff to remove and did remove said plaintiff

House" in the fact, the defendant, by its servants, etc., who were acting within the scope of their employment, with force and arms, made an assault upon the plaintiff, and wrongfully and maliciously struck, beat, wounded, and ill-treated him. The second count was substantially the same as the first in its averments with the addition that the defendant then and there imprisoned the plaintiff, and detained him in prison or elsewhere against reasonable or probable cause. The third count in its averment was substantially the same as the first and second, with a specific averment that defendant imprisoned plaintiff in said "bug house" and elsewhere in said Park for the space of one hour, and forced plaintiff from said Park into the public street and to go into and along diverse public streets to a certain police station in Chicago, and there imprisoned and detained plaintiff at said police station without any reasonable or probable cause, and that thereby the plaintiff suffered serious injuries to himself.

To the said specifications defendant filed two pleas, to-wit: the general issue, namely, not guilty, and a plea alleging that plaintiff made a gross police and discrimination against defendant's wife, and that the defendant was guilty of defending defendant's person and his wife "bug house"; that defendant requested plaintiff to leave said district house and to depart from said "bug house", and the plaintiff refused so to do, and that the reason defendant is believed of the possession of the "bug house", by its servants, is to keep other persons from entering and his house and plaintiff

from said "Bug House", and that because plaintiff resisted and assaulted defendant's servants, they did defend themselves and did necessarily and unavoidably strike, beat, bruise, wound and ill-treat the plaintiff, doing no unnecessary damage to him. The fourth plea is substantially the same as the third, with the additional averment that defendant gave plaintiff into the charge of one Fred Kemper, a police officer of the City of Chicago, and that said Kemper, as such police officer, in discharge of his duties, took the plaintiff into custody and conveyed him to a certain police station in said city by means of which plaintiff was imprisoned and detained in said police station.

To these pleas plaintiff filed general replication.

Defendant argues for reversal (I) that a master is not liable for a personal assault committed by his servants where the same is not within the scope of the servant's employment; (II) the refusal to give certain instructions tendered to the court which it contends correctly stated the principles of law applicable to the facts in the case; (III) that certain rulings by the court on evidence were erroneous and prejudicial; (IV) that where a corporation employs a special policeman, sworn in by the city, and pays him, the corporation is not responsible for his acts in making an arrest as such police officer.

It is not questioned but the plaintiff was lawfully upon the premises of defendant, and lawfully taking part in the amusement furnished by defendant in its Park, including the so-called "Bug House". The Park was an extensive

the same as the child, with the exception of the fact that
the child was white and the mother of the child was
a police officer of the city of Chicago, and that said
police officer, in discharge of his duties, took
the child into custody and conveyed him to a certain
police station in said city by means of which said
police officer was employed and detained in said police station.

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is not liable for a personal assault committed by his servants where the same is not within the scope of his servant's employment; (II) the refusal to give certain information resulted in his being held in contempt of court; (III) the principle of law applicable to the facts in the case; (IV) that certain findings by the court on evidence were erroneous and prejudicial; (V) that there is a question of law which the court should have decided; (VI) that the court's decision is not sustainable for any reason.

It is not understood why the plaintiff was
induced to give the proceeds of the sale of the
house in the amount furnished by defendant in the first
place. The defendant is a "Red Head". The

place, and was patronized by large numbers of people; that it employed about 1500 persons; that the so-called "Bug House" contained a variety of amusements, among which were slides, which extended from a platform about 30 feet above the ground floor and ran to the ground floor. These slides were popular with patrons, including men, women and children; that defendant had attendants placed both at the top and the bottom of the slides; the employees at the top attended to seating the people in the slides and regulated the use of the slides, and those at the bottom assisted the people to their feet, and otherwise regulating the attendance of patrons when they arrived at the foot of the slide.

It is in evidence that on the evening of the assault and imprisonment of the plaintiff, he was 18 years of age and in company with Horace G. Gurley, who was 19 years of age, and three young ladies, visited the Park; tickets were purchased and surrendered at the gate; these tickets entitled plaintiff and those persons with him to partake of the amusements in the Park, including the "Bug House"; in course of time the party entered the "Bug House", and after taking in several of the amusements found in the "Bug House" Gurley went on to the platform with the purpose in view of going down the slide, Boullie and the three young ladies remaining on the ground floor; that a guard was stationed at the top of the slide to temporarily prevent its use while it was being waxed. It appears that while Gurley was waiting to use the slide a

place, and was patronized by large numbers of people; that it employed about 1500 persons; that the so-called "Big House" contained a variety of amusements, among which were slides, which extended from a platform about 30 feet above the ground floor and ran to the ground floor. These slides were popular with visitors, including men, women and children, and were situated at the bottom of the slides; placed both at the top and the bottom of the slides; the employees at the top attended to sending the people in the slides and regulated the use of the slides, and those at the bottom assisted the people on their feet, and otherwise regulating the attendance of persons when they arrived at the foot of the slide.

It is in evidence that on the evening of the assault and imprisonment of the plaintiff, he was 15 years of age and in company with James G. Corley, who was 16 years of age, and three young ladies, visited the park; these persons were purchased and transported at the park; these tickets entitled plaintiff and those persons with him to participate of the amusements in the park, including the "Big House"; in course of time the party entered the "Big House", and after taking in several of the amusements found in the "Big House" Corley went on to the platform with the purpose in view of going down the slide, and the three young ladies remaining on the ground floor; that a crowd was gathered at the top of the slide to see plaintiff proceed as he was about to descend; in evidence that while Corley was waiting to use the slide a

young man, in no way connected with plaintiff or his party, wished to use the slide, but the attendant refused to permit him to do so; that thereupon a fracas occurred, in which the young man and the attendant came to blows; that Gurley started ahead to another slide intending to go down it, and as he approached this slide he was assaulted by an attendant who stood at the head of that slide and was knocked down, and he and the young man first mentioned were thrown down the slides; that when Gurley was thrown down the attendant at the top of the slide blew a whistle to attract the attention of the defendant's servants at the bottom of the slide, and when Gurley reached the bottom of the slide he was seized by defendant's employees and was again assaulted and was dragged to the controller room, a small room from which all the machinery was operated. At this point Houille came up, inquired about the trouble and several of the servants of defendant assaulted him, and he was dragged to and imprisoned in the controller room for about twenty minutes and was severely beaten by the servants of defendant while in the controller room. Gurley endeavored to escape from the assaulting employees, who ran after him and caught him, and he was again beaten and dragged back to the controller room, where he was kept for some time, until the arrival of two policemen, who took plaintiff and Gurley to the police headquarters in the park. They were kept there for some time, and until the city police patrol wagon arrived, in which they were taken to the Robey Street police station, a police station of the City of Chicago where they were detained for some hours and then released.

young man, in no way connected with himself or his party, wished to use the slide, but the attendant refused to permit him to do so, that thereupon a second occurred, in

which the young man and the attendant came to blows; that Gentry started ahead to another slide intending to go down it, and as he approached this slide he was accosted by an attendant who stood at the head of that slide and was knocked down, and he and the young man first mentioned were thrown down the slide; that when Gentry was thrown down the

attendant at the top of the slide blew a whistle to attract the attention of the attendant at the bottom of the slide, and then Gentry reached the bottom of the slide he was seized by defendant's employees and was again accosted and was dragged to the controller room, a small room from which all the machinery was operated. As this

point possible now up, inquired about the trouble and several of the servants of defendant accosted him, and he was dragged

to and imprisoned in the controller room for about twenty minutes and was severely beaten by the servants of defendant while in the controller room. Gentry endeavored to escape

from the assembling employees, who ran after him and caught him, and he was again beaten and dragged back to the controller room, where he was kept for some time, until the arrival of

two policemen, who took Gentry and Gentry to the police station in the past. They were kept there for some time, and until the city police patrol wagon arrived, in which they were taken to the city police station, a police station of the City of Chicago where they were detained for some hours and then released.

There was no error in the court's refusal to peremptorily instruct a verdict for defendant at its request.

We hold that defendant by its plea of the general issue admitted possession and operation of the Park and "Bug House", and that the attendants in charge of same were its servants. To put in issue the ownership and operation of the amusement park and the "Bug House", it was necessary for the defendant to file a special plea denying the ownership. G.W.T. Co. v. Jerka, 227 Ill. 95.

Furthermore it appears that defendant's counsel in his opening statement to the jury admitted in effect that the persons who committed the assault upon plaintiff were its servants, and such admission obviated the necessity of the proof of such fact.

In Oscanyan v. Arms Co., 103 U.S. 261, Mr. Justice Field, said that "the power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced."

However the record has convincing proof that all of the persons who took part in the assault upon plaintiff and his imprisonment were servants of the defendant, and that most of them were in charge of the slides in the "Bug House". The proofs abundantly sustain the contention that the assailants were employees and attendants at the defendant's amusement park, and demonstrates that they were, when they assaulted Gurley, employees of defendant, and were acting in unison, one set at the top of the "slide" and the others

There was no error in the court's refusal to per-
emptorily instruct a verdict for defendant at its request.

We hold that defendant by its plea of the general
issue admitted possession and operation of the truck and
"bug house", and that the attendance in charge of same
was its servant. It put in issue the ownership and con-
trol of the amusement park and the "bug house", it was
necessary for the defendant to file a special plea deny-
ing the ownership of the "bug house".

Furthermore it appears that defendant's motion
in its opening statement to the jury admitted its control
of the premises and admitted the ownership of the "bug house".
When its statement, and when admission admitted the neces-
sity of the proof of such facts.

In Spencer v. The City of Los Angeles, 100 Cal. 221, 223, 224, 225
Field, said that "the power of the court to act in the
disposition of a trial upon facts conceded by counsel is as
plain as the power to act upon the evidence presented."

However the record has convincing proof that all of
the persons who took part in the assault upon plaintiff and
his representative were servants of the defendant, and that
most of them were in charge of the sides in the "bug house".
The proof presented to the jury was that the
defendant was employer and servant of the defendant's
employees, and that the defendant was the one who
employed the "bug house" employees, and was acting
in union, one set at the top of the "sides" and the others

at the bottom of it; that those at the top gave the signal, a whistle and a verbal outcry to catch Gurley, which signals were heeded and Gurley was caught and assaulted by both sets of defendant's servants, and imprisoned, first in the controller room of the "Bug House", second in the Park Police Station, and third at the Robey Street Station, where he was subsequently released. These assaults and detentions were unlawful and without any legal process or complaint. The unity of action of the assailants of the boys is convincing evidence not only of their employment, but that they were attendants on the patrons of the Park, whose legal duty it was to protect such patrons, including the plaintiff.

The distinction in all of defendant's cases cited, is that the employer of the assaulting servant is not bound to protect the assaulted plaintiff, as was the duty of the defendant's servants in the case at bar. It is a general rule of law that common carriers, inn keepers, merchants, managers of theatres, and others who invite the public to become their patrons and guests, and thus submit their personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to expect that they shall be protected from injury while present on such invitation and particularly that they shall not suffer wrong from the agents and servants of those who have invited them. Railroad Co. v. Flexman, 103 Ill. 546; Callaghan v. Harvey, 225 Ill. App. 353. In the latter case the court said, "In this case the rights

at the instant of the shooting, the witness saw the defendant
in a violent and a verbal outburst to each other, which witness
then rushed and tried to separate and succeeded in doing so
at defendant's request, and defendant, from the time
witness took to the first witness, remained in the room.
Police Station, and tried at the Police Station.
There he was subsequently released. These accounts and
statements were related to witness and other persons
or complainant. The unity of action of the associates of the
boys is convincing evidence not only of their equipment,
but that they were attending on the actions of the boys,
which fact is not in question with witness, and which
the complainant.

The distinction in all of defendant's cases cited,
in that the employer of the assisting person is not bound
to protect the assisted plaintiff, as was the duty of the
defendant's servant in the case at bar. It is a general
rule of law that common carriers, innkeepers, restaurant
managers or proprietors, and others who invite the public to
become their patrons and guests, and upon whom their depen-
dence relies and consent to their keeping, owe a more special
duty to those who may accept such invitation. Such persons
and guests have a right to expect that they shall be pro-
tected from injury while present on such invitation and
entertainment and that such protection shall be given to the extent
and measure of those who have invited them. Barlow v. Brown, 101 Cal.
101, 102; Barlow v. Brown, 101 Cal. 101, 102.
In the latter case the court said: "It was the duty

of the plaintiff were grossly invaded by his arrest and incarceration at the police station without complaint or warrant and contrary to the law. The employer must be held responsible for the wrongful act of his servant in violating the duty which the proprietor of a hotel owes to one of his guests."

This doctrine is equally applicable to the patrons of amusements parks, where the public are invited and an entrance fee charged.

In Davis v. Tacoma R. & P. Co., 35 Wash. 203, the court said, "Every person not belonging to a proscribed class has a right to go to any public place, or visit a resort where the public generally are invited, and to remain there, during all proper hours, free from molestation by any one, so long as he conducts himself in a decorous and orderly manner. The right to freedom from molestation extends not only to freedom from actual violence, but to freedom from insult, personal indignities, or acts which subject him to humiliation and disgrace, and any one guilty of violating any of these rights is liable."

In Hoswell v. Barnum & Bailey, et al., 135 Tenn. 35, the court held that as a legal duty the proprietor of a place of amusement is required to exercise civil conduct toward those he permits to enter and remain on his premises. For a breach of such legal duty an action will lie; and said: "The servants of the plaintiffs in error in this case, no doubt acted in excess of their authority, but they were ushers, charged with the duty of assigning patrons of the

of the plaintiff were grossly invaded by his arrest and
sequestration at the police station without complaint or
warrant and contrary to the law. The employer must be
held responsible for the wrongful act of his servant
in violating the duty which the proprietor of a hotel
owes to one of his guests."

This holding is equally applicable to the action
for damages for the arrest and detention of the plaintiff
without law charged.

In Davis v. Johnson, 5 A. R. 221, 33 Wash. 202, the

court said, "Every person not belonging to a prescribed
class has a right to go to any public place, on which a
person where the public generally are invited, and to
remain there, during all hours of the day, and to
remain by any one, so long as he conducts himself in a
peaceable and orderly manner. The right to freedom from
interference extends not only to freedom from actual vio-
lence, but to freedom from insult, personal indignities,
and to some extent to respect for his individuality and dignity, and
any one guilty of violating any of these rights is liable."

In Marshall v. Birmingham, 10 A. R. 221, 33 Wash. 202, the

court said that as a legal duty the proprietor of
a place of amusement is required to exercise strict control
over those he permits to enter and remain on his premises.
For a breach of such duty an action will lie; and said:
"The servants of the plaintiff in error in this case, no
doubt acted in excess of their authority, but they were
there, charged with the duty of assisting persons of the

circums to seats and were undoubtedly acting within the general scope of their authority."

A sufficient answer to the contention that the assaulting officer was a city policeman is the fact which the officer himself testified to, that on the night of the occurrences in question he was in civilian clothes and had his police badge with him as he always carried it; that whenever he had a chance to go to Riverview Park he went, "and they paid me \$3.00 a night." Therefore this police officer was not on duty as a police officer of the City of Chicago. He was on duty at the amusement park in the employ and pay of defendant for the time being. This officer was asked and answered the following questions:

"Q. You didn't see these boys do anything in the Bug House? A. The fight was over. Q. You didn't see them violate any law, did you? A. No, sir. Q. You were told by the authorities to take them to the police station, weren't you? A. Yes, sir. Q. These men in the controller room told you to take these boys to the police station, didn't they? A. Well, yes. Q. And you had not seen the boys do a thing, had you? A. No, the fight was over. Q. You took them to the police station because the men in the controller room told you to do so? A. Yes, if I did not, I would have got into trouble."

This officer was at the time of the imprisonment of plaintiff off duty so to speak, as a city policeman, and on duty as a police officer for the defendant at its amuse-

...of this ...
...and ...
...of this ...

A ... answer to the ...
... officer was a city policeman in the fact that
the officer himself testified to, that on the night of the
occurrence in question he was in civilian clothes and had
his police badge within as he always carried it; that
nevertheless he had a chance to go to River View with his
"and they paid me \$2.00 a night." Therefore this police
officer was not on duty as a police officer of the City of
Chicago. He was on duty as the ...
and pay of ... for the time being. This officer was
asked and answered the following questions:

Q. You didn't see these boys on ...
the ... A. The ... of ...
... A. Yes, ...
told by the ... to take them to the police station,
woman's ... A. Yes, ...
room told you to take them boys to the police station.
didn't they? A. Well, yes. ...
boys do a thing, and you? A. No, the ...
Q. You took them to the police station because the man
in the controller room told you so no? A. Yes, ...
did not, I would have put into trouble."

This officer was at the time of the imprisonment
and ... only ... as a city policeman, and
on duty as a police officer for the ...

ment park.

The offer by defendant to prove by the record of the Municipal Court that Gurley, at some time prior to the occurrence in question, was convicted in said court of an assault and battery, was rightfully denied by the court. The disposition of Gurley was neither an issue by the proceedings or proofs. It was solely an attempt to impeach the veracity of Gurley as to immaterial matters brought out on cross-examination.

The testimony of Blanche Bilek, taken by stipulation, was not read in evidence at the trial, and therefore is not in the record or before us for review.

It is also argued for reversal that some of the witnesses, against the objection of defendant, testified to a conclusion that the persons in charge of the slides at the time of the occurrence in question were "attendants". In some cases the objection was sustained and in others the witnesses explained their conclusions by describing the actions of some of the so-called attendants, which tended to prove that such persons were attendants and employees of the defendant. The court did not err in these rulings. It stands to reason that the assailants of plaintiff, the servants of defendant, did not act literally within the scope of the authority of their employment when they assaulted the plaintiff in the sense that there were employed for that purpose, but it being the duty of defendant to see to it that its employees protected plaintiff, in failing so to do defendant was guilty of such negligence as entitles

new York.

The other by defendant to prove by the record of the United States Court that before, at some time prior to the occurrence in question, was convicted in said court of an assault and battery, was rightfully denied by the court. The disposition of Guilty was not an issue by the proceedings of process. It was solely an attempt to impugn the veracity of Guilty as to immaterial matters brought out on cross-examination.

The testimony of witness who testified that he saw the defendant, was not used in evidence at the trial, and therefore is not in the record as before me for review.

It is also argued for reversal that none of the witnesses, except the defendant, testified that at the time of the occurrence in question the persons in charge of the office were "absent". It seems to me the objection was sustained and in answer the witness testified that he was not by himself. It is also argued that some of the so-called statements, which were made to prove that such persons were absent and confessions of the defendant. The court has not in these matters. It seems to me that the recollection of the witness, the statements of defendant, did not set him off in the scope of the testimony of their witnesses when they

assaulted the witness in the sense that there were employed for that purpose, but it being the duty of defendant to see to it that the employee protect himself, in failing so to do defendant was guilty of such negligence as entitles

plaintiff to recover. It was the duty of the defendant to protect the plaintiff from assault and imprisonment, and in failing so to do it was guilty of negligence.

We have carefully examined all the other objections made to the rulings of the trial court, and without reciting them it is sufficient to say that there was no reversible error committed in any of such rulings.

We have examined all of the instructions, both given and refused, about which defendant complains, and taking them as a series we held that the jury were sufficiently correctly instructed upon the law applicable to the facts in evidence, and that in the court's rulings on such instructions there was no error of a reversible character.

There is no complaint regarding the amount of the judgment. Counsel for defendant in its brief characterizes the assault on plaintiff as a "brutal" assault. It is apparent that the jury was moderate in its assessment of damages.

Finding no reversible error in this record, the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

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ATTACHED

TAYLOR, J. J. AND SONS, J. COOK

246 I.A. 622³

70 - 31675

HORACE C. GURLEY, a minor by
JENNIE T. GURLEY, his next friend,

Appellee,

v.

RIVERVIEW PARK CO., (a corporation),

Appellant.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Nov. 23, 1927.

MR. JUSTICE HOLDOM delivered the opinion of
the court.

For the reasons stated in the opinion in case
Gen. No. 31674, handed down herewith, the judgment of
the Superior Court is likewise affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

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Opinion filed Nov. 23, 1937.

TO : MR. J. E. HARRIS, JR., DIRECTOR, FBI

● ၁၅၀၀ ခန့်

For the reasons stated in the opinion in case

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The Superior Court is likewise affirmed.

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82 - 31680

JOHN M. SMYTH, MARY A. SMYTH
NELSON and FRANK G. NELSON, Trustees,
doing business as JOHN M. SMYTH TRUST
ESTATE,

Appellants.

v.

M. HERRREICH,

Appellee.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 23, 1927.

MR. JUSTICE HOLCOM delivered the opinion of
the court.

In this case plaintiffs only appear to support
this appeal. Defendant is not in court, either pro se or
by counsel, and no brief has been filed in his behalf.

In the trial court there was first on August 18,
1926, a judgment for \$220 by confession under a warrant of
attorney contained in the lease demising the premises in
question, being rent for the months of June and July 1926,
with \$20 attorney's fees added. This judgment on motion
of defendant was opened and defendant let in to defend upon
the merits, the judgment standing in full force as security.
On the second trial before the court there was a finding
and judgment for \$150, as rent due for the month of June,
the court holding that defendant was not liable for the
July rent. There was no defense made to the June rent.
From this judgment plaintiffs bring the record to this court
seeking a reversal on the ground that the judgment should have
been for the amount confessed, viz. \$220.

11-11-11
11-11-11

THE COURT OF APPEALS, IN THE
SECOND DEPARTMENT, HAS
REVERSED THE DECISION OF THE
COURT OF COMMON PLEAS, IN THE
FIRST DEPARTMENT, IN THE
CASE OF

IN THE COURT OF APPEALS,
SECOND DEPARTMENT,
IN THE CASE OF

REVERSED

REVERSED

REVERSED

Opinion filed Nov. 25, 1937.

THE COURT OF APPEALS, IN THE

REVERSED

IN THIS CASE, THE COURT OF APPEALS, IN THE
SECOND DEPARTMENT, HAS REVERSED THE
DECISION OF THE COURT OF COMMON PLEAS,
IN THE FIRST DEPARTMENT, IN THE
CASE OF

IN THE COURT OF APPEALS,
SECOND DEPARTMENT,
IN THE CASE OF

REVERSED

REVERSED

REVERSED

REVERSED

The trial court placed its finding on the fact that the demised premises had been destroyed by fire on July 5, 1926, and that consequently no rent was due for that month. Defendant also contended in the trial court that the July rent was waived on condition that he vacate the demised premises at once, which he insists he did. This the plaintiffs deny.

The lease provided that the rent of \$150 per month should be paid on the first day of each and every month in advance, so that by this covenant of the lease the July rent was due July 1, 1926. It likewise appears from the evidence that defendant did not vacate the rented premises until after August 2, 1926, which was after the term of the lease had expired. However, there was in the lease a clause permitting defendant to extend the term of the lease for an additional two years, and defendant availed of this provision by giving a notice to the plaintiffs on December 3, 1923, in writing of the exercise of such rights. Defendant also attacked the legality of the lease on the ground that it was not executed by all of the plaintiff trustees.

It is clear that no such defense was available for the reason, among others, that defendant enjoyed full possession of the premises during the whole of the term demised, paid all rent thereunder in accord with the covenant to pay rent, with the exception only of the June and July rent. Fields v. Brown, 90 Ill. App. 135.

It is well settled that the lease is the contract of the parties and that rent is payable according to its

terms. On July 1, 1936, the rent became due and payable and defendant was liable therefor notwithstanding the destruction of the premises by fire five days thereafter. It was an accrued liability and if it had been paid prior to the fire it could not have been recovered back from the landlords by suit. Furthermore, defendant's defense is limited to the matters of defense set out in his affidavit of meritorious defense and no defense is made putting in question the validity of the lease under which defendant took possession, and without protest or question paid all the rent except that of June and July, and as to June admits his liability.

Guerra v. Reese, 181 Ill. App. 528, and many other decisions might be cited to sustain this dicta.

The fire covenant in the lease was to the purport and effect that upon the destruction of the premises by fire the term should cease and determine not that the lessee should be relieved from the payment of rent accrued under its terms or that rent paid should be refunded.

In Tarkovsky v. Neus, 64 Ill. App. 513, under a covenant to pay rent in advance, it was held that rent paid for a period after destruction of the leased premises by fire could not be recovered back. The court said: "Can a proportionate part of such payment be recovered back? We think not. The contract of the parties ought to govern." The risk of destruction of the leased premises by fire, the court held was defendant's, saying: "As we view the case, the risk of the lease being terminated before the time expired

for which rent was paid, was upon the party paying."

In Felix v. Griffiths, 56 Ohio St. 39, the court said: "As to the monthly installments, the contract is entire; and we think that where an installment was once paid, in conformity with the terms of the contract, it became the money of the lessor absolutely, and was not subject to be recovered back at the election of the lessee."

In Myer v. Lyons, 22 U.C.Q.B. 12, the rent was payable quarterly in advance. It was likewise provided that if the premises were accidentally destroyed by fire rent should cease. The premises were destroyed by fire six days after the commencement of a quarter, and the Canadian court held that the landlord was entitled to recover the quarter's rent notwithstanding the destruction of the demised premises by fire. The court held that the lessor was not only entitled to the rent but could have distrained for it.

In Berner v. Padula, 49 Appl. Div. 155, the court said: "If by the terms of the lease rent is to be paid in advance, the tenant comes under the absolute engagement to pay it on the day fixed, and he is not relieved from that engagement by the fact that the property is destroyed by fire, and he is liable to pay the rent due in advance, even though the destruction takes place on the very day it falls due." This opinion was affirmed in 187 N.Y. 511. There are many other reported cases to the like effect.

For the foregoing reasons the judgment of November 5,

Page 107, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 85

to be concerned with the situation of the laborer.

THE UNIVERSITY OF CHICAGO

1. The first of these is the fact that the Government has not yet decided whether or not it will accept the offer of the United States to purchase the surplus stocks of the Government. This is a very important question, and one which will have a great influence on the future of the Government. It is also a question which will have a great influence on the future of the United States. The Government has not yet decided whether or not it will accept the offer of the United States to purchase the surplus stocks of the Government. This is a very important question, and one which will have a great influence on the future of the Government. It is also a question which will have a great influence on the future of the United States.

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (C.L.A.) in the United States.

1926, involved in this appeal is reversed and the cause remanded with instructions to expunge the same from the record of the Municipal Court, and to reinstate its judgment entered on August 18, 1926, by confession for \$320 and costs.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND WILSON, J. CONCUR.

MARTIN POTOKAR,

Appellee,

v.

NIAGARA ATHLETIC CLUB,
a corp.,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Nov. 23, 1927.

MR. JUSTICE HOLBORN delivered the opinion of
the court.

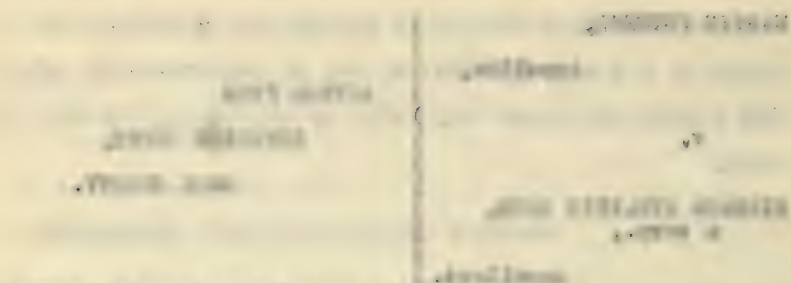
The plaintiff has failed to follow this appeal. There was a trial before court and jury and a verdict for \$974.75, upon which after overruling motions for a new trial and in arrest of judgment, the court entered judgment, and defendant appeals.

No questions arise upon the pleadings. It is therefore unnecessary to discuss them as the points in controversy sufficiently appear from the following statement.

It appears that plaintiff and defendant both owned vacant land on Leland avenue, in the Village of Lyons, Cook County. With the consent of the Village plaintiff had installed sewer and water pipes in front of the land of the parties, and plaintiff claims that defendant agreed to pay its proportionate share of the cost of that improvement. It appears that plaintiff procured the work to be done at a cost of much less than it could have been done in the usual course under the direction of the Village and the levying of and collecting the usual special assessments therefor.

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Opinion filed Nov. 20, 1927.

THE COURT HAS DELIVERED THE OPINION AS

THE COURT

The plaintiff has failed to follow this course. There was a trial before jury and a verdict for the plaintiff. The court has reversed the verdict and has ordered a new trial. The court has also ordered the plaintiff to pay the costs of the trial.

It is ordered that the plaintiff pay the costs of the trial. It is also ordered that the plaintiff pay the costs of the appeal.

It is ordered that the plaintiff pay the costs of the trial. It is also ordered that the plaintiff pay the costs of the appeal. The court has also ordered the plaintiff to pay the costs of the trial. The court has also ordered the plaintiff to pay the costs of the appeal. The court has also ordered the plaintiff to pay the costs of the trial. The court has also ordered the plaintiff to pay the costs of the appeal.

The real bone of contention of defendant is that it never agreed to pay for the installing of the sewer and water pipes in front of the land.

It is true, as contended by defendant, that the evidence regarding its agreement to pay its share of the cost of the improvement and its liability therefor is "highly contradictory". However that may be, there is plenty of evidence proffered by plaintiff which, if the jury believed in preference to the evidence of defendant, justifies their verdict.

That the matter was discussed many times with the officers of the Club, including its president, and at meetings where many of the Club members were present, is not denied. That the sewer and water pipes were installed in front of defendant's property is not denied, and that whether defendant pays therefor or not, it has the benefit of the improvement to its property. It clearly appears from the evidence that the president and other officers and many members of the Club had knowledge of the putting in of the sewer and water pipes, and that none of them made any protest against the installation, as the work progressed, and have advantaged of the benefits thereof to its land ever since, and still enjoys the advantage to its land flowing from the installing of the sewer and water pipes.

John H. Buck, one of the attorneys for the defendant, testified upon the trial in its behalf without withdrawing his appearance as such attorney. He still appears as counsel with his associates on the record, brief and abstract filed in this court. This was contrary to legal ethics. The jury might

The fact that it is not possible to find any evidence in the
case of the person in question is not sufficient to show that
the person is innocent.

It is true, as pointed out by the court, that the
evidence against the person in question is not sufficient to show
that the person is guilty. However, the fact that the person is
not guilty is not sufficient to show that the person is innocent.
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therefore have concluded from his dual relationship to the case that his testimony was unworthy of belief and gave but slight or no credence to it. The outstanding feature in the case is the undenied fact that the sewer and water pipes were built without any protest or objection from defendant, and that its property enjoys the benefit of these improvements. We think from all the evidence the jury might well conclude, that with defendant's consent, the improvement was installed, the benefits of which it still enjoys, and that it is in consequence liable to pay plaintiff therefor. There is no serious dispute regarding the justness of the amount of plaintiff's claim, or of the amount of the judgment, if defendant is legally liable to pay it.

The only errors in procedure argued by defendant relates to the giving of two of the instructions proffered by plaintiff, one of which was modified by the trial judge. We have scanned these instructions with much care, and as applied to the facts before the jury we find that they state accurately the law which the jury should apply to the facts before them. The modification of instruction No. 3 by the trial judge was an efficient correction thereof to any infirmity apparent in it before such modification.

Finding no reversible error in the record before us, the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

112 - 31720

246 I.A. 622⁶

LEOPOLD STANCATO,

Appellee,

v.

CHICAGO BUSINESS MEN'S RACING
ASSOCIATION, a corp.,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Nov. 23, 1927.

MR. JUSTICE HOLCOMB delivered the opinion of
the court.

For the reasons set forth in case General Number
31712, Harry Stancato v. Chicago Business Men's Racing
Association, the judgment in this case is reversed and the
cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

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Opinion filed Nov. 23, 1927.

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113 - 31721

246 I.A. 6227

LOUISE IANNOMA,

Appellee,

v.

CHICAGO BUSINESS MEN'S RACING
ASSOCIATION, a corp.,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Nov. 23, 1927.

MR. JUSTICE HOLDEN delivered the opinion of the
court.

For the reasons set forth in case General Number
31,519, Harry Stancato v. Chicago Business Men's Racing
Association, the judgment in this case is reversed and the
cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

1220 A.1348

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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• *Food for thought*

Opinion filed Nov. 23, 1937.

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THE UNIVERSITY OF CHICAGO

114 - 31722

246 I.A. 622⁸

GIACOMO ARDITA, et al,

Appellees,

v.

CHICAGO BUSINESS MEN'S RACING
ASSOCIATION, a corp.,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Nov. 23, 1927.

MR. JUSTICE NELSON delivered the opinion of
the court.

For the reasons set forth in case General Number
21,719 Harry Stancato v. Chicago Business Men's Racing
Association, the judgment in this case is reversed and the
cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

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115 - 31733

246 I.A. 623¹

HARRY STANCATO, Administrator,
etc.,

Appellee,

v.

CHICAGO BUSINESS MEN'S RACING
ASSOCIATION,

Appellant.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Nov. 23, 1927.

MR. JUSTICE HOLDSOM delivered the opinion
of the court.

For the reasons set forth in case General Number
31,719 Harry Stancato v. Chicago Business Men's Racing
Association, the judgment in this case is reversed and
the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

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Opinion filed Nov. 23, 1937.

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LUDIE COTTLE and WILLIAM COTTLE,

Appellees,

v.

ONAS. B. TRAVIS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed November 23, 1927.

MR. JUSTICE HOLDEN delivered the opinion of the court.

Plaintiffs had judgment against defendant on September 24, 1926, in the Municipal Court, for the sum of \$480, with costs, on an ex parte hearing, and on October 26, 1926, that judgment was on motion of plaintiffs reduced to the sum of \$450, and from that judgment of \$450 defendant prayed and perfected this appeal, and seeks a reversal on an assignment of errors numbering four.

These errors are the overruling by the court of the defendant's motion to strike plaintiffs' second amended statement of claim from the files; in entering judgment for plaintiffs; in overruling defendant's motion to vacate and set the judgment aside, and in overruling a motion in arrest of judgment.

Plaintiffs' second amended statement of claim sets forth a cause of action to which defendant interposed an affidavit of merits in defense, and therefore the order denying defendant's motion to strike it from the files was without error. It therefore follows that there is no error

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Opinion filed November 23, 1957.

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in the statutory record.

There is no bill of exceptions in the record, nor any evidence in the record by which we might determine whether the court arrived at a correct decision upon the hearing of the case. The hearing was ex parte, and there is nothing to show any irregularity in proceeding to trial in the absence of the defendant.

Reference has been made in the briefs to a suit between the same parties in the Superior Court of Cook County, but we find nothing regarding the same, either in the record or the abstract thereof, except in the second amended statement of claim which could not be evidence without by proper proof introducing the same on the trial.

For these reasons the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P. J. AND WILSON, J. CONCUR.

in the following manner:

There is no bill of exchange in the account.
Not only evidence in the account by which it is shown
that the account is a correct statement of the
state of the case, but the account is in itself
a statement of the state of the case, and it is
in the account of the account.

Reference is made to the account in a bill

between the two parties in the account of the
account, but no bill is shown regarding the account, which in
the account of the account is shown, and in the account
of the account of the account is shown.

Without proper proof, the account is not to be taken.

The account is the account of the account.

and is shown.

and is shown.

and is shown.

16 - 31304

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

JOSEPH FOLTA,

Plaintiff in Error.

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

Opinion filed November 23, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

This is a writ of error to the Criminal Court of Cook County, brought by Joseph Folta, plaintiff in error, who was indicted for embezzlement on three separate counts. The first count charges that defendant converted to his own use \$1,470, of the personal goods, funds, money and property of Tow Tysiac Sulcownych No. 877, Polish National Alliance, a corporation. The second count charges that defendant, as the financial secretary of the above mentioned organization, embezzled and fraudulently converted to his own use \$1,470, personal goods, funds, money and property of said organization. The third count charges that said defendant did steal, take and carry away the sum of \$1,470, personal goods, funds, money and property of the before mentioned organization.

On May 17, 1926, the felony charge was waived, and the defendant entered a plea of not guilty to petit larceny, and the jury being waived there was a trial before the court

STATE OF NEW YORK	IN SENATE
JANUARY 12, 1937	
REPORT	
OF THE	
COMMISSIONERS OF THE LAND OFFICE	
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE	
ON JANUARY 12, 1937	

Opinion filed November 28, 1937.

THE COMMISSIONERS OF THE LAND OFFICE

ALBANY, N. Y.

THIS IS A COPY OF THE REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE, AS REQUIRED BY

SECTION 10 OF THE LAND OFFICE LAW, AS AMENDED BY

CHAPTER 100 OF THE LAWS OF 1936, AND BY CHAPTER 100

OF THE LAWS OF 1937, AND BY CHAPTER 100 OF THE LAWS

OF 1938, AND BY CHAPTER 100 OF THE LAWS OF 1939,

AND BY CHAPTER 100 OF THE LAWS OF 1940, AND BY CHAPTER 100

OF THE LAWS OF 1941, AND BY CHAPTER 100 OF THE LAWS

OF 1942, AND BY CHAPTER 100 OF THE LAWS OF 1943,

AND BY CHAPTER 100 OF THE LAWS OF 1944, AND BY CHAPTER 100

OF THE LAWS OF 1945, AND BY CHAPTER 100 OF THE LAWS

OF 1946, AND BY CHAPTER 100 OF THE LAWS OF 1947,

AND BY CHAPTER 100 OF THE LAWS OF 1948, AND BY CHAPTER 100

OF THE LAWS OF 1949.

IN WITNESS WHEREOF, the said Commissioners have caused

the said report to be signed and the seal of the said

Commissioners to be hereunto set, at Albany, New York,

resulting in a finding of guilty against the defendant, of petit larceny; and the value of the property was fixed at \$14.00.

It appears that plaintiff in error was the financial secretary of an incorporated society known as Tow Tysiac Walsceznym No. 877, Polish National Alliance, which, interpreted means Thousands of Braves Society, No. 877, Polish National Alliance, under which last name it is referred to throughout the testimony. The society was an incorporated society under a charter granted November 24, 1934, and which it was stipulated was the charter of the Thousands of Braves Society, No. 877, Polish National Alliance, and was admitted in evidence. The testimony shows that among the officers of the society there was a president, financial secretary, and a treasurer; and that plaintiff in error was the financial secretary, operating under a by-law of the society which provided that he was to receive all moneys coming to the Society and receipt therefor, and then turn same over to the treasurer; and to keep a complete list of all members, with their addresses, etc., and to make reports from time to time. It appears that there were over 800 members of the Society and that they paid dues from time to time, and also such special assessments as might be levied; that the various accounts were kept in certain books which were kept by the plaintiff in error; and that it was the result of the audit of these books that resulted in the indictment in question. The auditor's report of the books from January 1, 1934, to December 31, 1934, showed a deficit of \$1,475.49. Plaintiff in error attempts to explain the discrepancy on the ground

remains in a state of quietude and repose, of

which I have not been able to find any trace

of it.

It appears that the disease is not only

characterized by an extraordinary rapidity of

progress, but also by a peculiar kind of

prostration, which is not only

characterized by a peculiar kind of

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that the dues were frequently collected in the evening during the meeting, and while there was talking and discussion, and a good deal of noise; and that frequently he had to leave and go to the saloon below in order to make change when some member handed him a bill of any considerable size. He further testified that some times he found that one of the officers, sitting at his left, would stamp more pages than he told him to, and would some times stamp three pages, or three months dues, and then tell plaintiff in error that the member was paying for only two months; and that he, plaintiff in error, complained of this to the president and this officer was instructed to be more careful. The undisputed fact appears to be from the testimony, that during the period of one year, out of a total collection of approximately \$11,000, the books of plaintiff in error showed a deficit of over \$1,400, without any real plausible reason or excuse, and without any statement other than that it may have been the fault of some person assisting plaintiff in error. The abstract of record filed by plaintiff in error becomes a pleading in the cause and should be complete, and this court is not required to and should not go to the record for the purpose of searching for testimony not contained in the abstract. There is nothing in the abstract which shows that it is an abstract of all the testimony heard upon the trial of the cause, and the court has a right to indulge in the presumption that under such circumstances there may have been other evidence heard by the trial court, based on which that court arrived at its opinion. This court in the case of McGovern v.

that the same were thoroughly satisfied in the various things
the meeting, and after the first was finished and discussion
and a good deal of interest was shown in the way of
points and up to the various things in order to come through
also were asked to send a bill of exp. materials to the
department mentioned and were asked to send them to the
attendant, although at the last, some things were taken from
he told him not to send them until they were ready, as
these matters were, and were well thought of in order that the
meeting was held for the meeting and that he, himself
in order, mentioned at this in the presence and his address
was mentioned to be more general. The department that
appeared to be from the department, and during the meeting at the
first, was at a small collection of approximately \$1,000, the
point of the meeting in order to make a point of view of it, and
without the fact that the meeting was held, and without
any statement other than that it was held from the fact
of some persons feeling that it was, the meeting
at which it was held, it was held at a point
in the room and should be mentioned, and this was in the
meeting in order to be in the room and to be in the room
in meeting for meeting and meeting in the meeting.
There is nothing in the meeting which shows that it is in
interest of all the meeting from the fact of the
meeting, and the meeting was in order to be in the meeting
that meeting was mentioned from the fact of the meeting
without being up the meeting from the fact of the meeting
meeting at the meeting. The meeting was in the meeting.

City of Chicago, 208 Ill. App. 139, in its opinion, on page 144, says:

"The abstract is the pleading of the parties in a court of review, and whatever is sought to be reviewed must be contained in that pleading. Without a motion for a new trial in a cause tried by a jury, there can be no review except as to errors assigned on the common law record appearing in the abstract. An examination of the abstract develops the fact that a written motion for a new trial was filed, and it is stated that the grounds for such motion are substantially the same as the errors assigned on the record. This is not sufficient to bring to this court for review the questions presented to the trial court as reasons for granting a new trial. To avail of such written motion, that portion relied upon for reversal must appear in the abstract. This court will not go to the record to reverse, although it will search the record, regardless of the abstract, to affirm."

Moreover, the court's attention is called to the fact that a number of exhibits, including the report of the auditor, which is referred to in the abstract but not abstracted; certain pages of defendant's books which were introduced in evidence; and twelve certain receipts which are marked "Defendant's Exhibits 2 and 13", are not contained in the abstract, and in order to consider them, it would become necessary for this court to go to the record, as there is nothing in the abstract from which this court could gather anything as to the nature of such testimony. In the case of Gibler v. City of Mattoon, 167 Ill. 18, the court in its opinion, on page 22, says:

"It is the duty of the parties bringing cases here for review to prepare and file complete abstracts of the record in accordance with the rules, and such abstracts as we can safely rely upon. It is not our duty to perform this work of counsel, which, in detail, as to them is considerable, but when imposed upon us is, in the aggregate, extremely burdensome."

Again, the Supreme Court in the case of Rahfuss v. Hill, 243 Ill. 140, in disposing of the question of the admission of copies of certain exhibits, said:

"Be that as it may, appellant is in no position to raise this question. Copies of these exhibits were not made a part of appellant's abstract. Our rules require that an abstract 'must be sufficient to fully present every error and exception relied upon.' (235 Ill. p. 14) * * * It is the duty of parties bringing cases here for review to file complete abstracts of the record, in accordance with the rules, of every point which they wish to present to this court."

These exhibits necessarily, being important in the case and not being abstracted, and the court being under no duty to search the record, it follows that this court should assume that the trial court, who did consider said record and exhibits, may have placed considerable reliance upon them in arriving at its decision in said cause, and, these matters not being before us, it necessarily follows that this court cannot undertake to reverse said cause - all the testimony not being before it.

In view of the fact that the accounts were complicated, there was no objection to receiving in evidence the auditor's report. The People v. Baskill, 299 Ill. 326.

The Society was incorporated November 24, 1924, and such moneys as came into the hands of plaintiff in error prior to the incorporation, necessarily became and was the money of the corporation after it was incorporated and prior to the indictment in the case, so that we are not inclined to give any weight to the proposition that prior to the time of its incorporation the Society was a partnership

and for that reason that the indictment should not lie.

For the reasons given in this opinion, the judgment of the Criminal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

All der Schule Imagefilm mit zwei neuen Filmrollen

For the purposes of this system, the

Department of the Interior, Bureau of Land Management

THE UNIVERSITY OF CHICAGO

THE GARRETT BIBLICAL INSTITUTE,
a corporation,

Appellee,

v.

FRANKLIN FIRE INSURANCE COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 23, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

The facts in this case are brief and consist largely of documentary evidence. It appears that the plaintiff below, Garrett Biblical Institute, a corporation, between January 13, 1916, and January 13, 1919, was the owner of certain premises located in the city of Chicago, and that on December 23, 1915, the defendant below leased to the plaintiff a fire insurance policy, insuring said premises for \$3,333.33, for the period of three years, beginning January 13, 1916; that plaintiff paid, as premium for said insurance, the sum of \$343.00, by its check dated February 7, 1916, and made payable to Douglas Bros. & Rice, Inc. After the payment of said check, which was endorsed by Douglas Bros. & Rice, the policy of defendant in error, Franklin Fire Insurance Company, was issued and delivered to plaintiff and remained in full force and effect during the time of the period of insurance. Sometime prior to October 13, 1916, plaintiff caused to be installed in its premises a sprinkler system, for fire protection;

and on that date, as appears on the back of the policy, the following endorsement was made:

"Chicago October 18, 1916,
Rate reduced to .9425 from date
on account of sprinklers installed.
Rebate \$310.56.
John D. Gory & Co., Agent."

It appears that this was a stamped endorsement, except that the figures ".9425" and "\$310.56" and the words "sprinklers installed" were written in ink. It is practically admitted by the record that plaintiff below did not receive from the Franklin Fire Insurance Company or any of its agents, the \$310.56 rebate which it was entitled to. It is insisted on behalf of defendant below that it affirmatively appears that the claim is barred by the Statute of Limitations; and further, that the plaintiff did not prove a cause of action. It is urged on the latter ground; (a) that it does not appear that the \$242.00 alleged premium was paid to the defendant or its authorized agent; (b) that it does not appear that Douglas Bros. & Rice were the authorized agents of the defendant; and (c) that the claim, if any, is on a refund while the endorsement refers to a rebate. It is undisputed that John D. Gory & Company were the agents of the Franklin Fire Insurance Company during the time in question, so that whatever action may have been taken, in regard to the policy, by John D. Gory & Company, would naturally be binding on the defendant principal. It is also admitted, by the affidavit of assets filed in the Municipal Court, that John D. Gory & Company was exchanging business with Douglas Bros. & Rice, and that when said policy of insurance was issued,

Douglas Bros. & Rice was charged on the books of John D. Cory & Company with \$242.00 as premium for said policy. And it is further admitted by said answer, while denying that any money was received by John D. Cory & Company, that, nevertheless, after the installation of the sprinkler system, a credit of \$210.58 was allowed to Douglas Bros. & Rice in a settlement between that Company and John D. Cory & Company.

On the back of the policy of insurance in question, there appears a pasted or sticker with the words:

"Douglas Bros. & Rice, Inc.
I N S U R A N C E."

In so far as the question, whether or not the Franklin Fire Insurance Company received the payment of the premium, it is undoubtedly true and of considerable significance, as a matter of evidence, that if the Company did not receive its premium payment of \$242.00, in the first instance, paid by the insured, it made no effort to collect the same, and the inference would naturally be drawn from that fact that the Company would not allow a policy of insurance to stand for that time, without at least making some effort to collect; so that it necessarily follows, in our opinion, together with the other facts and circumstances in the case, that we can arrive at but one conclusion, namely, that the original check for \$242.00, payable to Douglas Bros. & Rice as payment for the premium of insurance on the policy in question, was considered by the defendant as a payment of the premium. And we are not concerned with the question as to whether or not this was so considered by them as a matter of bookkeeping between John D. Cory &

London News. & also was charged on the books of John R. Day & Company with \$242.00 as premium for said policy. And it is further admitted by said answer, while denying that any money was received by John R. Day & Company, that nevertheless, after the installation of the sprinkler system, a credit of \$242.00 was allowed to London News. & also in a settlement between said company and John R. Day & Company. In the face of the policy of insurance in question, there appears a policy as follows in the record:

"London News, & also, Inc.
1888 & 1889."

It is so far as the question, whether or not the Franklin Fire Insurance Company received the payment of the premium, it is undoubtedly true and of considerable significance, as a matter of evidence, that if the Company did not receive the premium payment of \$242.00, in the first instance, paid by the insured, it was no effect as collected. The same, and the inference would naturally be drawn from that fact that the Company would not allow a policy of insurance to stand for that time, without at least making some effort to collect; so that it necessarily follows, in our opinion, together with the other facts and circumstances in the case, that we are satisfied that the Company, immediately, that was required to pay for \$242.00, before to London News, & also as payment for the premium of insurance on the policy in question, was collected by the defendant as a payment of the premium. And we are not concerned with the question as to whether or not this was so considered by them as a matter of bookkeeping between John R. Day &

Company and Douglas Bros. & Rice, or whether, as a matter of fact, they actually did receive payment of the premium of insurance in question. The fact remains that the policy was issued and carried in full force and effect, and after payment by check to Douglas Bros. & Rice, no further effort was made on behalf of the defendant below to collect the premium of insurance.

The principal reliance of the defendant below appears to be that the Statute of Limitations offers a bar to the collection of this indebtedness. In support of this contention it is argued that until such time as it actually appears that the premium had been paid, there would not arise a situation where the defendant would be responsible under an implied obligation to refund. In the view we take of the evidence, as hereinbefore announced, there is sufficient to show a payment of the premium in question. Moreover, we are of the opinion that the endorsement of John D. Cory & Company, which appears to have been stamped on the face of the policy, became and was a part of said policy; and that the parties had a right to make changes or alter conditions in said instrument, so as to make it an integral part of said policy, by either endorsing it upon the face thereof or by changing the policy itself. The policy contains a provision providing for this very thing, namely, that it was made and accepted subject to stipulations and conditions made therein, together with such other provisions and conditions as might be endorsed thereon or added thereto. It is a well known fact that in commercial usage, in order to facilitate

expedition of business, stamps are in general use, and, unless something appears to the contrary, there would be no reason to doubt the genuineness of such a stamp; particularly where the printed matter contained in the vacant spaces on such stamp conforms to the facts and evidence in the case under consideration, as it appears on the face of this stamped endorsement. Considering as we do, that the stamp bears the mark of genuineness, it further contains an acknowledgment by John B. Cory & Company, Agent, of the payment of the original premium by plaintiff below, and, on a failure of the defendant to show payment of the amount of the indebtedness admitted on the rider on said policy, for the sum of \$210.58, we see no reason why the judgment of the trial court was not properly entered. We consider that the endorsement on the policy became part of the same, and was sufficient to impart a promise to pay, as it relates to the plaintiff below, the sum of \$210.58, on October 12, 1918, - the date on the face of the endorsement and, therefore, not subject to the defense of the Statute of Limitations.

For the reasons announced in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

and, therefore, was subject to the defense of the Statute of
October 10, 1914, - the date of the issue of the endorsement
as a rebate to the plaintiff below, the one of \$110.00, on
of the same, and was entitled to refund a rebate to pay,
The plaintiff filed the endorsement on the 10th of January 1915
by the judgment of the trial court was not properly entered.
on said policy, for the one of \$110.00, as was no reason
of the amount of the endorsement admitted on the 10th
below, and, on a failure of the defendant to show payment
about of the amount of the original premium by plaintiff
further evidence as corroborated by John E. Gray & Company,
as we do, that the group below the mark of endorsement, is
in the form of this endorsed endorsement. - Endorsing

out, including with the business interest of the

... ..

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STATE OF NEW YORK, SENATE, JANUARY 12, 1909.

INDUSTRIAL GLASS CO., a corp.,	}	APPEAL FROM
Appellant,		
v.		
GEORGE A. NELSO,		MUNICIPAL COURT
		OF CHICAGO.
Appellee.	}	

Opinion filed Nov. 23, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

The record in this case discloses that on October 4, 1926, plaintiff below, Industrial Glass Co., filed its statement of claim in the Municipal Court, in which it charged that it furnished material to the defendant, George A. Kelso, which was used in and about the construction of a certain building owned by the defendant; and that said material was furnished at his special instance and request. Summons issued out of said court and on October 19, 1926, the appearance of the defendant was filed and an order entered at the same time, extending the time to plead. November 1, 1926, an order was entered in the Municipal Court, finding the defendant in default for want of an affidavit of merits. A judgment was entered upon the default, in the amount of \$274.87 in favor of the plaintiff below. December 7, 1926, an order was entered setting aside the judgment of November 1, 1926, and granting time to file an affidavit of merits to the statement of claim.

INDUSTRIAL BANK CO., INC.
 SPECIAL AGENT
 V.
 GEORGE A. KELSO
 Appellee

Opinion filed Nov. 23, 1937.

The record in this case discloses that on October 4, 1936, Plaintiff filed a complaint against Defendant in the Circuit Court of this State, alleging that Defendant had wrongfully converted to his own use certain property owned by Plaintiff, and that said material was furnished to him by Plaintiff's agent and servant. Judgment was rendered on October 12, 1936, in favor of Plaintiff, and an order was entered at the same time, directing the sale of the property. On November 1, 1936, an order was entered in the Circuit Court, finding the defendant in default for want of an affidavit of service. A judgment was entered upon the default, in the amount of \$175.00 in favor of the plaintiff. Defendant, however, has failed to satisfy the judgment, and on November 7, 1936, an order was entered directing the judgment of November 1, 1936, and directing the sale of the property in satisfaction of the judgment.

From this order of the Municipal Court, plaintiff below appealed.

There is but one question involved, namely, as to whether or not the court had jurisdiction to set aside the judgment, where it does not appear from the record that the defendant below had complied with the statutory provisions in regard thereto. The section of the statute with reference to such a proceeding to vacate a judgment of the Municipal Court, (Cahill's Ill. Stats. ch. 37, sec. 409) is as follows:

"NO STATED TERMS OF COURT VACATION OF JUDGMENTS AND DECREES. Par. 21. That there shall be no stated terms of the municipal court, but said court shall always be open for the transaction of business. Every judgment, order or decree of said court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court during the terms at which the same was rendered in such circuit court; Provided a motion to vacate, set aside or modify the same be entered in said municipal court within thirty days after the entry of such judgment order or decree. If no motion to vacate, set aside, or modify any such judgment, order or decree, shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified, excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court."

No petition to the Municipal Court, setting forth grounds for vacating, setting aside or modifying the judg-

ment in this cause, was filed and there was nothing upon which, from the record, the court could predicate an order opening the judgment and permitting the defendant to file an affidavit of merits. Gallay v. Mathis, 195 Ill. App. 170.

The order entered by the Municipal Court was an appealable order. Imbrie v. Bear, 230 Ill. App. 155. This court, therefore, is of the opinion that the Municipal Court erred in setting aside the judgment entered November 1, 1936, and permitting defendant below to file an affidavit of merits. Accordingly, the order will be reversed and the cause remanded to that court with directions to expunge the order of December 7, 1936, from the record.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

and so the no survivors of winter. *Blackburn* *et al.* 1993

The order entered by the Municipal Court was an appealable order. Leffler v. Hart, 230 Ill. 144, 145, 91 Ill. 2d 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952,

RECEIVED BY THE DIRECTOR, FBI, 11/11/68

1947-1948

WILLIAM H. WHEELOCK and WILLIAM
G. BIERD, Receivers of the
CHICAGO AND ALTON RAILROAD COMPANY,
a corp.,

Appellees,

v.

JOSEPH STOCKTON TRANSFER CO., a
corporation, on appeal of
CHICAGO AND NORTH WESTERN RAIL-
WAY COMPANY, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 23, 1927.

MR. JUSTICE WILSON delivered the opinion
of the court.

This was an action brought under paragraph
11 of section 20 of the act of Congress known as An
Act to Regulate Commerce, (Carmack Amendment). The
action was brought in the Municipal Court of Chicago
by the Receivers of the Chicago and Alton Railroad Com-
pany against the Joe. Stockton Transfer Co. and the
Chicago & North Western Railway Company. The statement
of claim, in effect, charges that the plaintiff below,
receivers of the Chicago and Alton Railroad Company,
were the initial carriers of certain goods which had been
lost in transit by one or the other of the two defendant
companies after delivery by the receivers, to the defend-
ant Stockton Transfer Company, for delivery by Stockton
to the Chicago & North Western Railway Company, at the
latter's 16th Street Station in the City of Chicago.
It is further charged that plaintiff below paid the claim,

<p>RECEIVED U. S. DEPARTMENT OF JUSTICE WASHINGTON, D. C.</p>	<p>NOV 23 1937</p>
<p>TO: SAC, CHICAGO</p>	<p>FROM: SAC, NEW YORK</p>
<p>SUBJECT: [Illegible]</p>	<p>[Illegible]</p>
<p>[Illegible]</p>	<p>[Illegible]</p>
<p>[Illegible]</p>	<p>[Illegible]</p>

Opinion filed Nov. 23, 1937.

The following information was received from the Chicago office on November 23, 1937:

On November 22, 1937, the Chicago office received a letter from the New York office, dated November 21, 1937, in which the New York office advised that it had received information from a confidential source that a certain individual, whose name is not recalled, had been seen at the Chicago office on November 21, 1937. The New York office further advised that this individual was seen in the company of a certain individual, whose name is also not recalled, and that they were seen in the company of a certain individual, whose name is also not recalled. The New York office further advised that this information was obtained from a confidential source who has provided reliable information in the past.

The Chicago office is currently conducting an investigation into the activities of certain individuals, and the information received from the New York office is being reviewed. The Chicago office is also conducting an investigation into the activities of a certain individual, whose name is not recalled, and the information received from the New York office is being reviewed. The Chicago office is also conducting an investigation into the activities of a certain individual, whose name is not recalled, and the information received from the New York office is being reviewed.

The Chicago office is currently conducting an investigation into the activities of certain individuals, and the information received from the New York office is being reviewed. The Chicago office is also conducting an investigation into the activities of a certain individual, whose name is not recalled, and the information received from the New York office is being reviewed. The Chicago office is also conducting an investigation into the activities of a certain individual, whose name is not recalled, and the information received from the New York office is being reviewed.

and, under the Carmack Amendment, the defendants or either of them, became liable to the plaintiff for the amount so paid out by it to cover the loss in question. Aside from the question of fact involved, as to whether or not delivery was made by defendant below, Stockton Transfer Co., to the Chicago & North Western Railway Company, but two questions are involved - one as to the charge of the court below to the jury and the other as to the limitation of time for argument. As to the first of these two contentions; it does not appear that an objection was made at the time of the giving of this instruction, and, therefore, this court will not consider that assignment of error. As to the second point involved, namely, the limitation of time for argument, it does not appear that counsel for the Chicago & North Western Railway Company saved any exception but, on the other hand, appears to have consented to the limitation. The real and vital question involved in the case is whether there was a delivery of the goods in question by the Stockton Transfer Co. to the other defendant, Chicago & North Western Railway Company.

It appears that twenty-four shipments or packages, in less than car load lots, were delivered admittedly by plaintiff below to the Jos. Stockton Transfer Co., and that three of these less than car load lots consisted of a consignment of shoes, for transportation to Fond Du Lac, Wisconsin; a bale of overalls, for transportation to Rice Lake, Wisconsin; and a shipment of shoes, for transportation to Newman's Grove, Nebraska. It is also undisputed that these three shipments constituted part of a total of twenty-four shipments which were received by the Stockton Transfer

and, while the witness intended, the defendant in effect
to show, however liable to the plaintiff for the money so
paid, but it is not the law in question, which law
the question of this inquiry, as to whether or not delivery
was made by defendant before, through plaintiff's hands, to the
plaintiff's agent, namely, the defendant, and the question
was answered - was as to the charge of the money being in
the bag and the other as to the liability of the bag for
payment, as to the time of issue and delivery, it
does not appear that in question was made as to the fact of
the giving of the money, and, therefore, that money
will not consider that assignment of money, as to the
money being delivered, namely, the liability to the bag
payment, it does not appear that money was the money
a third person, namely, the defendant, and the question
as to the bag, appears to have remained in the bag
then. The bag and the money were in the bag
is stated there was a delivery of the money in question
by the defendant, namely, as to the money delivered, namely
a third person, namely, the defendant.

It appears that defendant intended to pay money
in fact that the law, with reference and finally by
plaintiff's law as to the money, namely, the
that there is some law that the law was intended to
a assignment of money, for the defendant to pay to the
plaintiff, a debt of money, the assignment to him
like, namely, and a delivery of money, the assignment
to plaintiff's agent, namely, it is also intended that
some other person, namely, the plaintiff, and a delivery of money
that defendant's law, was intended by the plaintiff to pay

Company from the plaintiff below. It is further admitted and undisputed, that all of these shipments were received by the Chicago & North Western Railway Company from the Stockton Transfer Company, except the three particular shipments hereinbefore enumerated, which appear in the record as plaintiff's Exhibits 1-a, 1-b and 1-c. Each of these separate twenty four items were receipted for by the Chicago & North Western Railway Company, at the time of delivery by the Stockton Transfer Co.; but all of the items, except the three particularly enumerated, were receipted for upon the general receipt of the Railway Company and their receipt is undisputed by that defendant. The twenty-one receipts admitted by the Chicago & North Western Railway Company were signed by one Phelan, whose employment for that defendant is admitted, and the records of this defendant, Chicago & North Western Railway Company, show the receipt of the goods marked 1 to 21, and apparently appear to be the only record of the shipment in question, and they do not contain a record of the shipment of the other three shipments; and the general foreman Lorenzen, testified that he never saw these three shipments. It appears that at the time in question there were about seventeen checkers under the control of Lorenzen and there were about 155 men employed at the station in question as truckers or haulers. Frank Winted, a witness for the defendant Stockton Transfer Company, testified that he had been in its employ for 22 or 23 years. He testified defendant Stockton's exhibit 1, which is a sheet showing shipments received from the Chicago and Alton Railway Company and showing the three items in question, and which was signed by him at the time, indicating that he had re-

ceived the twenty four shipments. He testified that he delivered the three particular shipments enumerated, to the Chicago & North Western Railway at 16th Street and Jefferson; that he did not know who stamped "Chicago & North Western Railway Company" on them, and did not know who the man was, but that the stamp was put on inside the freight house; and that he did not see any of them stamped, but he counted them back to see whether he got his receipts back.

It appears further that the defendant's witness Wixted identified his signature on the defendant's Exhibit 1, which is a list and included the three shipments in question. His signature also appears on the sheet stamped "Chicago and Alton Railroad Company" for the same number of shipments, namely, twenty-four, which was introduced in evidence and marked as defendant Chicago & North Western Railway Company's Exhibit 3. The three particular receipts covering the three particular shipments appear to have been receipted by the stamped receipt of the Chicago & North Western Railway Company, and is the same stamped receipt which appears on the other twenty-one shipments. But the twenty-one shipments acknowledged to have been received, are signed for by one Phelan, whereas the receipts for the three particular shipments bear the name "Phen" but are in the same colored ink as those which were signed by Phelan. The witness Wixted was permitted to refer to the exhibits for the purpose of stating how many packages he had delivered and we can see no objection to this as it was an instrument signed by him at the time in question and would have been proper for the purpose of refreshing his memory as to the number of packages.

The case was one purely of fact for the jury, as to whether or not the Jos. Stockton Transfer Co., defendant below, through its agent Wixted, delivered the three packages in question to the Chicago & North Western Railway Company. The record of the Stockton Company shows such a delivery. The three receipts signed by the Chicago & North Western Railway Company bear their printed receipt, and while it may be argued that there is no evidence that the man signing these three receipts had any authority to do so, and while it may appear that the signature at the bottom of the receipts was an attempted imitation of the signature of Phelan; and that the packages were not, in fact, delivered, this court is constrained to hold that the verdict of the jury on this question of delivery was one that this court would be unable to say was not supported by the evidence; and for that reason the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDEN, J. CONCUR.

92 - 31700

CATHERINE KAISLING, Executrix of the
Estate of William Kaisling, Deceased,

Appellee,

v.

THE KELLOGG SWITCHBOARD & SUPPLY COMPANY,
a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed November 23, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

This was a suit brought on a contract of employment between William Kaisling and The Kellogg Switchboard & Supply Company, a corporation. The contract was entered into between the parties July 18, 1909, and recites that "whereas the said Kaisling is an inventor and designer and is possessed of certain special knowledge concerning the design and construction of automatic switches and other parts adapted for telephone service" and the Kellogg Company is desirous of securing the services of said Kaisling as an inventor and designer, therefore, the parties covenant and agree that said Kaisling shall, during the life of this agreement, devote his time and attention to the services of The Kellogg Company, and during the period of the contract shall not, directly or indirectly, engage in, or aid in, or be interested in any similar business or employment; that the agreement may be terminated by either party, by giving the other party thirty days' notice, in writing, of its desire to terminate

the contract. The contract provides for the salary to be paid; and that if the said Kaisling should design or conceive any mechanism whatsoever which might be advantageously used in the business of the Kellogg Company, he will notify the President of the Kellogg Company, in writing, and accompany the same with a description and explanatory sketches; and shall take such necessary steps as the Company may require to procure the patenting of any such devices or mechanisms as the Company or its agents may require. Further: that the Company may, within 90 days after such descriptions have been made to its satisfaction, cause an examination to be made of such invention, and if it then desires to acquire the same, to notify, within 90 days, the said Kaisling, in writing, of its election so to do, and thereupon, the said Kaisling agrees to procure the patents. The Kellogg Company further agrees, upon the execution of each such application for United States Letters Patent and the assignment thereof to the Kellogg Company, to pay to said Kaisling the sum of fifty dollars, the same being in addition to his regular salary; and Kaisling further agrees to sign all papers and take the necessary steps to procure the reissuance of any patent or patents. He agrees not to apply for or take out, or authorize anyone else to take out, foreign patents while in the employ of the Kellogg Company, except such as the Kellogg Company has failed to acquire the right to, as provided in the contract. It appears that by agreement it was stipulated, in open court, that Kaisling has died since the commencement of said suit, and that Catherine Kaisling is the executrix of the estate; that

[illegible]

the contract hereinbefore referred to, was entered into and he continued to work under said agreement until on or about January 15, 1924, when, by reason of ill health, he absented himself from his place of business and never returned to the plant of the defendant company; that the defendant continued to pay to plaintiff's intestate the amount set out in the contract until on or about the first day of April, 1924, and that thereafter the defendant continued to pay him one-half of the compensation provided for in the contract, until on or about August 1, 1924, when payment ceased; that on January 1, 1925, the decedent caused a thirty days' notice in writing to be served upon the defendant, terminating the contract; that at no time did the defendant Company cause any notice to be served upon the decedent in his lifetime, terminating the contract in question; that under the notice served by the decedent, the contract (under the view taken of it by the plaintiff below) terminated February 11, 1925; that during the month of March 1925, the defendant caused the decedent to execute certain documents, which were assignments of applications for letters patent applied for at some time during the life of the contract in question; that the amount recoverable, if it should be held that the contract terminated February 1, 1925, would be the sum of \$2,333.34.

Defendant offered to show that upon the failure of the plaintiff below to appear at the plant of the Kellogg Company, one Bohman assumed to and did perform the duties which had been performed by the deceased; and that said Kaesling was apparently unable to use his left hand and to understand orders for work given to him; and that his employment was that of a

[illegible]

For every year in his life, the author has been a

model maker; and that as such he was employed during 1923 and 1924; and that he was, in effect, partly paralyzed. Two exhibits were offered in evidence on behalf of the defendant, which are marked defendant's Exhibits 1 and 2. The first one is a communication dated October 2, 1924, signed by counsel for the deceased and addressed to the defendant company, in which, in effect, he calls the attention of the company to a conversation concerning Kaising, and asks that they advise him as to their position regarding the Kaising claim for salary. Defendant's Exhibit 2, is a communication from the defendant company to counsel for Kaising, evidently in reply to the defendant's Exhibit 1, stating that in their opinion the action of the company constituted sufficient notice to be considered as a termination of any contract employment.

Based upon the stipulated facts, the trial court, as appears from the testimony, took the position that there being no conflict in the evidence, the facts having been agreed to, and being uncontroverted, it became his duty as a matter of law to apply the law to such facts, and thereupon the trial court instructed the jury to return a verdict for the plaintiff. As a result of which the jury found the issues for the plaintiff and assessed damages in the sum of \$2,332.34, and the court entered judgment upon the verdict.

To reverse this judgment, the defendant below and appellant here contends the cause should be reversed because there was no evidence to sustain the verdict; and further, that the disability of the plaintiff terminated the contract. Defendant, as a further cause for setting aside the verdict,

says:

"The facts showed no intent on the part of the master to waive future performance of services by Kaising, nor could any election by the master to treat the contract as continuing in force enable Kaising to recover wages for work not done."

Defendant further urges that the action of the trial court in directing a verdict was wrongfully done and that a verdict should have been directed in its favor.

The contract in this case differs from the ordinary contract of employment, in that in addition to contracting that the employee would, during the life of the contract, perform services for the defendant below, there was a further covenant in the contract that he would not engage, directly or indirectly, in any other or similar employment; so that, as a matter of fact, the consideration was not only that he should perform services for the defendant below, but there was the further consideration that he would not work for anybody else, nor furnish anybody else with ideas or suggestions which might come to him as an inventor. In other words, while it might have been that the plaintiff below, by reason of his illness, was rendered physically incapable of performing his usual manual services for the defendant below, which was engaged in a technical business, nevertheless, his services might have been of such character, as an inventor, that it would be willing, as part of the consideration of the contract, to pay him in order that competing concerns, in the same line of business, could not become entitled to his peculiar services. While it may be argued that the payments by

"The first thing we found on the road was
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defendant below, after the knowledge had come to it of plaintiff's incapacity, by reason of illness to perform the actual manual labor might be construed as gratuities, nevertheless it might also be argued that the defendant still considered that plaintiff's ideas, his services and his inventions were the property of the defendant, and it might be reasoned that the payments indicated a desire to retain the services of the employee, who for so many years had been connected with the concern. The contract contained an express clause providing that either party to the contract could terminate it upon a 30 days' notice, in writing, and in this regard the case is dissimilar to some of the authorities cited by counsel. It is argued that from the facts in the case, it was apparent plaintiff was unable to perform his part of the agreement, but, as stated hereinbefore, part of the consideration in the agreement was that he should also refrain from performing services for any other concern, and it did not necessarily follow, from a reading of the contract, that all of these services were to be of a physical character. It is true that on October 27, 1934, the defendant wrote a letter stating, in effect, that the actions of Mr. Knisling and of the Company, constituted notice of the termination of any possible contract. But this court has held that where there is an express agreement in the contract for a notice of termination, in the manner provided in the contract, that then this notice should follow the language of the agreement and should be clear and unequivocal. Harris v. Hess Bright Company, 125 Ill. App. 363. In that case it appears that under a clause of a contract, requiring

three days' notice to cancel the same, a letter was written to the employee by the employer stating that "the best way to relieve us of an embarrassing situation would be for you to immediately set about looking for another business connection and resign." It was held that this notice was not a notice within the meaning of the contract nor sufficient to cancel it.

We have carefully examined the case of Bartmouth Ferry Commission v. Marks, 34 Canada Supreme Court Reports 366, cited by defendant below in its brief. The contract in that case is for services purely physical in their character and contains no covenant not to engage in employment with any other concern. Furthermore, it appears from the opinion of Killam, J., page 376 of the opinion, and following, that the court was not entirely in accord with the proposition that illness terminated the contract. But the learned judge concurred in the opinion because of the fact that he found that the parties had mutually agreed to modify the contract and to change the same because of the illness of the employee. In his opinion, page 385, he says:

"But it would be clearly in the power of the master to waive a right to discharge for the incompetency of the servant; and so, I think, the right to discharge for incapacity arising from illness would be waived and lost by conduct showing a continuance of the employment."

The case of Horton v. Wickwire Spencer Steel Corporation, 239 Mass. 524, is one much in point and analogous to the case at bar, although not cited by counsel. In this case it appears that the plaintiff was employed as a mechanical engineer and inventor, and the contract of employment contained

in have recently examined the case of Elizabeth
Levy Donovian V. Levy. It should be noted that the
case, filed by the State in the State, the State
in that case is the same as the State in the State
and mention an agreement not to engage in any other
any other business. Therefore, it appears from the opinion
of Justice J. J. Levy of the court, and following that
the court was not satisfied in regard with the transaction
but Justice Levy the court. The court
judge mentioned in the opinion because of the fact that he
found that the parties had actually agreed to sell the
contract and to change the name because of the illness of
the wife. In his opinion, the court, he says

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a clause to the effect that the agreement could be terminated by either party by serving notice upon the other not less than sixty days prior to any anniversary of the date of the agreement. The duties of the plaintiff below consisted mostly of performing some designing and inventing. He did not work from November 1919, to August 28, 1920, by direction of the defendant's superintendent, at which time the general manager of the company wrote him a letter stating that the contract would be discontinued for the balance of the year. The court held that under the circumstances his contract was in full force and effect for the year beginning August 28, 1920, although it appears from the record that no work was performed by him during that time. The effect of the decision in that case is that even though the employee performed no work under the contract after an attempted notice of the employer, that notice not being in conformity with the agreement, the contract was still in full force and effect.

It appears from the testimony in the case at bar that after the contract was terminated February 1, 1925, apparently at the instigation and request of the defendant the plaintiff below performed other services under the contract, in that he made an assignment of his interests in certain patents or application for patents. Evidently it would appear that if the defendant below considered that the contract was terminated in either the month of April or August, 1924, it would have procured the assignments in question immediately after the termination of the agreement; and the fact that these further services of the employee were not called upon until after the notice by

him, and after the termination of the contract by him, would indicate that the services were not fully performed nor was performance requested until after the plaintiff below had, himself, terminated the agreement in accordance with the express terms of the contract.

We are ^{not} fully in accord with the manner of arriving at a judgment in this case, in that the trial court undertook to stipulate as to what the facts were and based its judgment upon the same. But, as there appears to have been no objection to this manner of proceeding, this court cannot undertake to alter the fact and the manner of procedure, no exception having been saved, before the trial court.

For the reasons expressed in this opinion the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLCOM, J. CONCUR.

246 I.A. 624³

95 - 31703

NELLIE K. LAMBERT,

Appellee,

v.

FIRST STATE PAWNERS SOCIETY,
(a corp.)

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed November 23, 1927.

MR. JUSTICE WILSON delivered the opinion of
the court.

This was an action for replevin to recover
a diamond ring, together with a count in trover, alleging
the value of said property.

From the testimony it appears that plaintiff
below had left a certain diamond ring with one J. L.
Akison, to be sold for her, and took a receipt for the
same. It further appears that later on Akison disappeared.
Plaintiff below made a search for her property and found
that there was a record at the detective bureau, showing
that a ring had been pawned by one Akison at the First
State Pawnors Society, defendant below. She called at
the place of business of the First State Pawnors Society,
and asked for her ring by its recorded number and when
it was produced, she testified, she recognized it was her
ring. The facts appear to be undisputed that she did
have such a diamond ring and did leave it with Akison;
that he did disappear; that he did pawn a diamond ring

with the defendant below and never, thereafter, made demand for it; and that he received a receipt for same, which is marked plaintiff's Exhibit 2, and no one else has claimed the property from the First State Pawners Society.

At the time of the hearing, a ring was produced by defendant below which plaintiff stated looked like her ring but was different in carving, and it is argued that it would be impossible for her to identify the diamond ring, and that she did not sufficiently do so in order to sustain this verdict and judgment.

Our attention has been called to the case of Horwitz v. First State Pawners Society, 239 Ill. App. 664, which appears to be an appeal from a judgment of the Municipal Court finding the facts against the plaintiff below, and which judgment was affirmed by this court. In that case, however, the trial judge apparently was not satisfied with the evidence brought to sustain the statement of claim, and there appears to have been, as the court stated a clear difference between the ring in question and the one described by the plaintiff below.

As before stated, the undisputed fact is that the man with whom the plaintiff below, in the case at bar, left her ring, pawned the ring with the defendant and no one, up to the time of the hearing, had made a claim for it. It further appears that the ring in question was a woman's diamond ring, and her own testimony is that she tried it on at the time she called at the First State Pawners Society and that it was her ring. This last state-

After the defendant's arrest, the defendant, who
 himself for the first time in his life, was
 taken to the police station, and he was
 not allowed to see his family or friends.

At the time of the hearing, a jury was
 sworn to inquire into the facts of the case.
 The jury was told that the defendant was
 charged with the crime of murder, and it was
 their duty to determine whether or not the
 defendant was guilty of the crime charged.
 The jury was also told that the defendant
 was entitled to a fair trial, and that the
 jury was to decide the case on the basis of
 the evidence presented to them.

The defendant was then called to the stand
 and testified that he was not guilty of the
 crime charged. He testified that he was
 with the victim at the time of the killing,
 but that he did not know who killed the
 victim. He testified that he was not
 involved in the crime, and that he was
 not responsible for the death of the
 victim. He testified that he was not
 guilty of the crime charged, and that he
 was innocent of the crime.

After the defendant's testimony, the
 prosecution called its witnesses. The
 first witness was the victim's brother,
 who testified that he was with the
 victim at the time of the killing, and
 that he saw the defendant kill the
 victim. He testified that the defendant
 was the one who fired the shot that
 killed the victim. He testified that the
 defendant was the one who took the
 victim's body away from the scene of the
 crime. He testified that the defendant
 was the one who was seen running away
 from the scene of the crime.

ment, however, is disputed by defendant but the court below had the opportunity of seeing and hearing the witness testify, and we are of the opinion that there was sufficient evidence to sustain the verdict and judgment.

For that reason and the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P. J. AND HOLBOM, J. CONCUR.

which, however, is supported by evidence and the facts
which bear the opportunity of making and having the
evidence fairly, and on the basis of the evidence that there
was collected without the evidence was collected.

Now that means and the means stated in
this manner, the judgment of the evidence is
evidence.

REMARKS BY THE COURT

THE COURT, in the case of the

PEOPLE OF THE STATE OF ILLINOIS,
ex rel BERNICE ZUKAUSKI,

Appellee,

v.

JOE KAULAS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 23, 1927.

MR. JUSTICE WILSON delivered the opinion
of the court.

This case comes before us on an appeal from a
judgment in favor of The People ex rel Bernice Zukauski,
against Joe Kaulas. The charge is bastardy. The jury
found the defendant guilty and judgment was entered by
the trial court in the usual statutory form, requiring
payment by the defendant to the clerk of the court.

From the testimony of the complaining witness,
Bernice Zukauski, it appears that she had intercourse with
the defendant for the first time, on or about March 5, 1925;
again, on or about November 22, 1925; again, on or about
March 14, 1926; and on other occasions which were not
definitely placed nor remembered by her, but which appear
to have been about every two months, between March 15th,
1925 and March 14th, 1926. Defendant denies ever having
had intercourse with the complaining witness, but the testimony
shows that they were attending school together and were

frequently seen together; and it is undisputed and admitted by the defendant, that he took her from school in an automobile three or four times, although he stated that others were with them on these occasions. Complaining witness testified as to one particular occasion when they had intercourse, on the evening of November 23, 1925. She testified that they drove to the place in an automobile. The child was born on September 6, 1926. The testimony shows that the defendant was accustomed to drive the car belonging to his family and had done so frequently; that it was an Alcar, as testified to by the complaining witness.

There is nothing in her testimony which would be calculated to arouse suspicion, nor is there any testimony in the record, as to the conduct of the complaining witness with other men, which would arouse suspicion. The length of time, as placed by the complaining witness, between the period of gestation and birth, is not out of the ordinary. The question was one, under all the circumstances, for the jury, and we find no occasion to reverse on a question of fact.

Our attention is called to certain instructions given on behalf of the People, which, it is argued, constitute reversible error. One of these instructions told the jury that the defendant, while a competent witness in his own behalf, it was nevertheless for the jury to judge of his credibility. It is argued that this called the attention of the jury to one of the two parties and, therefore, is error. This same kind of an instruction was passed in the

case of The People v. Enke, 214 Ill. App. 224, where the court in its opinion on page 227 says:

"The court instructed the jury in substance that while the defendant was a competent witness in his own behalf it was left to the jury to judge of his credibility, and that in doing so the jury had a right to consider the probability or improbability of his story in the light of all evidence in the case, and appellant argues that thereby the rule was violated that prohibits calling the attention of the jury to the testimony of one of two parties in the case as calculated to lead the jury to understand that the court considers that there is some reason why the evidence of the party mentioned should be particularly scrutinized. The rule contended for is well established, but we are not aware that it has ever been applied to bastardy cases but on the contrary, in People v. Bibb, 155 Ill. App. 371, it was expressly held to be a proper instruction in such a case. In prosecutions in the name of the People, such instructions referring to the testimony of the defendant are proper."

Counsel seeks to have this ruling of this court disregarded but we find no reason for doing so. In cases of this character between the State and the defendant, while it is on the relation of a complaining witness, nevertheless, it is not the kind and character of cases between individuals.

It is further argued by counsel for the defendant that it was reversible error to instruct the jury to the effect that the date of the intercourse was immaterial. Such an instruction has been held erroneous, where the testimony was as to only one particular act of intercourse, and where there was no testimony as to any other such acts between the parties. This instruction has been expressly approved in the case of The People v. Enke, *supra*, where there was evidence of such acts on other and different occasions, within a reasonable period.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-11-2010 BY 60322 UCBAW

1. The first part of the report is a general statement of the work done during the year. It is a summary of the work done by the various departments of the institution, and is intended to give a general idea of the progress made during the year.

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in the relation of a working class, revolutionary,
character between the state and the people, which it is
but we find no reason for doing so, in favor of this
General seems to have his mind of this most disorganized

It is further agreed by counsel for the Defendant
that it was reasonable under the facts and law to the
effect that the state of the information was immaterial,
an investigation had been held previously, where the statement
was so clearly convincing and its importance, and where there
was no testimony as to any other such acts between the parties.
This investigation has been extensively reported in the news
at The Journal N. York, Albany, New York and various other
newspapers which are likewise available, which is known.

J. J. ...

In the case at bar there was testimony of other acts of intercourse between the parties, and for that reason the giving of this instruction would not, in our opinion, be reversible error. The trial court and jury had an opportunity to see the witnesses and consider their testimony, and we see no reason to disturb the judgment.

For the reasons given in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P. J. AND MCLODD, J. CONCUR.

In the case at bar there was testimony of other
 acts of intercourse between the parties, but for that reason
 the giving of this instruction would not, in our opinion,
 be reversible error. The trial court and jury were in-
 structed to use the evidence and conduct their delib-
 erations, and we are in accord with the judgment.

For the reasons given in this opinion, the judgment
 of the district court is affirmed.

REVEREND JUSTICE

REVEREND JUSTICE, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

JOHN M. LOWERY,

Appellee,

v.

TONY BIVIENIS, et al,

Appellants.)

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed November 23, 1927.

MR. JUSTICE WILSON delivered the opinion
of the court.

This was an action in the Municipal Court of Chicago in assumpsit, for legal services rendered by appellee, plaintiff below, for appellants, defendants below. The trial resulted in a verdict by the jury in favor of the plaintiff for \$1500.00, and judgment was rendered thereon. The claim is for legal services rendered under a statement of claim charging that they were rendered for defendants at their special instance and request. Defendants' affidavit of merits denied the rendition of the services, and further, that they were not worth the sum claimed in the statement of claim. On the trial, testimony was introduced as to the services and as to the value of the same. In view of the fact that the question of their value was expressly raised by the defendants, they cannot now be heard in objection to the effect that testimony was introduced in support of the value of the services. Moreover, defendants denied that there was any agreement as to the amount that was to be charged for the services, and it has been held that there

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Opinion filed November 28, 1927.

THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

IN RE

THE UNITED STATES OF AMERICA

vs.

JOHN EDGAR HOOVER

Appellant

vs.

THE UNITED STATES OF AMERICA

Respondent

Appeal from the District Court of the District of Columbia

Case No. 1000 - 1000

Submitted for decision on November 28, 1927

Decision rendered on November 28, 1927

Opinion filed November 28, 1927

Appeal allowed

Reversed and remanded with instructions

to the District Court to take a new trial

Costs to be paid by appellant

Attorney's fees to be paid by appellant

Witness fees to be paid by appellant

suit is based on the common counts, relying upon a contract which has been fully executed and there is a conflict in the testimony as to whether or not there was such a contract, then testimony as to the value might be heard and recovery had on a quantum meruit. People Casualty Claim Adjustment Company v. Barrer, 172 Ill. 61. As we have already stated, the defendants by their affidavit of merits expressly raised the issue of the value of the services performed and therefore, cannot now be heard to object to testimony in support of plaintiff's contention on this particular question. Moreover, no question can be raised in this case as to the sufficiency of the evidence to support the verdict, it appearing that no motion for a new trial nor objection to the overruling of same, if it was overruled, nor motion in arrest of judgment was made. The record of the clerk shows a motion for a new trial and the overruling of same but no such order or motion appears in the bill of exceptions. The proper way to preserve a motion for a new trial and motion in arrest of judgment, is by a bill of exceptions, and in the absence of such, this court takes the cause as it finds it without the preservation of the questions that would be raised by such a motion in the trial court. Whitely v. Hule, 230 Ill. App. 218. The court in its opinion in that case at page 218 says:

"It is contended on the part of appellants for a reversal of said judgment that the court erred in its rulings on the evidence, in overruling the motion made by them for a new trial and in entering judgment on the verdict. In order to present for our determination the questions here sought to be raised, it was necessary that appellants preserve, by proper bill of exceptions, the motion for a new trial alleged to have been made by them and the trial court's ruling thereon. Daniels v. Shields, 38 Ill. 197;

Mason v. Letz, 73 Ill. 371; Chicago, B. & Q. R. Co. v. Hasselwood, 194 Ill. 89. This was not done. A motion for a new trial appears in the transcript of the proceedings and files as certified to by the clerk of said court. This action on the part of the clerk is extra official. The authority to certify that a motion for a new trial was entered rests alone in the trial judge. Such motions only become a part of the record by being incorporated in the bill of exceptions, Janigis v. Shields, supra; Mason v. Letz, supra; Graham v. People, 115 Ill. 505; Gould v. Howe, 137 Ill. 361; Harris v. People, 130 Ill. 457; Chicago, B. & Q. R. Co. v. Hasselwood, supra. The bill of exceptions contains no reference to a motion for a new trial.

The bill of exceptions purports to contain the evidence in the case and the rulings of the court on the admission and exclusion of evidence, but before a reviewing court can pass on whether the trial court erred in its ruling on the evidence, that question must be first presented to the trial court on a motion for a new trial in order to give that court an opportunity to pass on the same. Such motion and ruling of the court thereon must, as above stated, be presented by the bill of exceptions."

Anderson v. Karstens, 207 Ill. 76; Greenwell v. Heene, 298 Ill. 459; State of Illinois v. Mayhew, 326 Ill. App. 186. Under this rule, as contained in the authorities, referred to, this court is without judicial authority to examine the testimony with reference to its weight, nor can it consider the questions of error arising from the giving of instructions or in the admission of evidence. This court has, however, considered the testimony and so far as the evidence disclosed therein, no substantial injustice has been done defendants by the verdict and judgment in question.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDEN, J. CONCUR.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a long and detailed letter, covering many topics, including the state of the Union, the progress of the war, and the administration of the government. It is a very important document, as it provides a clear and concise statement of the President's policies and goals.

2. The second part of the document is a report from the Secretary of the War Department, dated January 10, 1862. It is a detailed report, covering the progress of the war, the state of the army, and the administration of the department. It is a very important document, as it provides a clear and concise statement of the Secretary's policies and goals.

3. The third part of the document is a report from the Secretary of the Navy Department, dated January 10, 1862. It is a detailed report, covering the progress of the war, the state of the navy, and the administration of the department. It is a very important document, as it provides a clear and concise statement of the Secretary's policies and goals.

4. The fourth part of the document is a report from the Secretary of the Treasury Department, dated January 10, 1862. It is a detailed report, covering the progress of the war, the state of the treasury, and the administration of the department. It is a very important document, as it provides a clear and concise statement of the Secretary's policies and goals.

5. The fifth part of the document is a report from the Secretary of the Interior Department, dated January 10, 1862. It is a detailed report, covering the progress of the war, the state of the interior, and the administration of the department. It is a very important document, as it provides a clear and concise statement of the Secretary's policies and goals.

6. The sixth part of the document is a report from the Secretary of the Agriculture Department, dated January 10, 1862. It is a detailed report, covering the progress of the war, the state of the agriculture, and the administration of the department. It is a very important document, as it provides a clear and concise statement of the Secretary's policies and goals.

7. The seventh part of the document is a report from the Secretary of the Education Department, dated January 10, 1862. It is a detailed report, covering the progress of the war, the state of the education, and the administration of the department. It is a very important document, as it provides a clear and concise statement of the Secretary's policies and goals.

8. The eighth part of the document is a report from the Secretary of the Justice Department, dated January 10, 1862. It is a detailed report, covering the progress of the war, the state of the justice, and the administration of the department. It is a very important document, as it provides a clear and concise statement of the Secretary's policies and goals.

9. The ninth part of the document is a report from the Secretary of the State Department, dated January 10, 1862. It is a detailed report, covering the progress of the war, the state of the state, and the administration of the department. It is a very important document, as it provides a clear and concise statement of the Secretary's policies and goals.

10. The tenth part of the document is a report from the Secretary of the War Department, dated January 10, 1862. It is a detailed report, covering the progress of the war, the state of the war, and the administration of the department. It is a very important document, as it provides a clear and concise statement of the Secretary's policies and goals.

1. The results of the investigation are as follows:

... The
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... ..

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161 - 31772

PAUL HOLUBEK,

Appellee,

v.

LOUIS B. CASEY,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 23, 1927.

MR. JUSTICE WILSON delivered the opinion
of the court.

This is an appeal from a judgment of \$150.00,
entered in the Municipal Court of Chicago, in favor of
the plaintiff and against the defendant, by the trial court
without a jury.

The facts show that the plaintiff was a decorator
in the City of Chicago and had been for about fourteen
years; that on or about July 14, 1926, he entered into an
agreement with the defendant to do certain work on the pre-
mises of the latter; that this work included washing the
calamine off the walls and putting paper on seven rooms and
a hallway; and putting one coat of enamel on the bath room
and kitchen, and calamineing four closets. Plaintiff and
his helper testified as to the doing of the work, and from
the testimony in the cause it appears that certain of the
walls had been varnished and as a consequence, the paper
would not stay on. It appears from the evidence that it
was proper under such circumstances to have sixed the walls
and removed the varnish. Testimony was introduced on behalf

THE STATE OF TEXAS,
COUNTY OF DALLAS,
ss. I, the undersigned, a Notary Public in and for the State of Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, State of Texas, and that the same is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, State of Texas.

WITNESS MY HAND AND SEAL OF OFFICE, this 11th day of May, 1911.

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS,
COUNTY OF DALLAS.

THE STATE OF TEXAS,
COUNTY OF DALLAS,
ss. I, the undersigned, a Notary Public in and for the State of Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, State of Texas, and that the same is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, State of Texas.

of the defendant to the effect that the job had been improperly done and would have to be done over. In the course of the opinion the court said:

"Can you expect to get that for \$175? I would have to put it on there in my own flat -- it costs to put it on mine nearly eight hundred dollars for the paper, and I only had five rooms. On the second floor, they put up -- of course, that cost only three hundred and fifty dollars, and, not only that, I have to furnish the paper. Don't you think for the eight rooms and the kitchen and steps and a lot of other things, that for \$175.00, that is kind of a ridiculous thing? Isn't it a little bit ridiculous -- about two rooms for the painting and everything, isn't that a little bit ridiculous?"

The court again said, later on during the course of the proceeding

"I will tell you what I think about it: Not long since, when I talked with this man and this one about papering -- I haven't a bit of doubt but what the facts are, though I haven't looked at it, haven't been there. I haven't a doubt but it was poor, it was mighty cheap; it was so cheap that they can't do everything properly, the hallways, the steps and everything else, they can't do everything; it is a kind of ridiculous thing to me.

There is no question in my opinion but some of that paper, of course, will stick and some of it, will not. I haven't a bit of doubt but that it will have to be recalculated, part of it. Perhaps you could make some of it stick and perhaps you couldn't, I don't know. Of course it wouldn't injure the painting. The painting will stick, I am sure and the -- of course, he did a little painting there. I don't know --" * * *

"Certainly, that would stick, the paint, so that he ought to be paid as far as the paint is concerned, for part of the material. The material ain't much."

The finding of the court was for \$150.00, and against the defendant. The contract between the parties provided that the work was to be done for \$175.00 and this amount was claimed by the plaintiff in his statement of claim. The plaintiff and his helper testified on behalf of

It was suggested that the following be added to the list of names of the persons who were in the room at the time of the shooting:

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The following is the report of the investigation conducted by the Bureau of the Federal Bureau of Investigation, United States Department of Justice, on the subject of the above-captioned case.

the plaintiff, and several expert witnesses testified on behalf of the defendant, to the effect that the job could not be done in a workmanlike manner under the circumstances in evidence. The suit was not based upon the reasonable value of the services but was predicated upon a written contract or agreement for an amount stated. The court's opinion, from the language quoted, was based upon what is considered the services were reasonably worth, from its observation in a matter which was purely personal to itself. Objection is made by counsel for the defendant to the remarks of the court, on the ground that the verdict is not in conformity with the evidence, but is based on facts coming to the attention of the court in some transaction of its own, upon which it is attempted to base an opinion in the cause on trial before it. Further objection is made by the defendant on the ground that the remarks indicated a prejudice on the part of the court against the defendant. It is true that where a case is tried to the court without a jury the court is not required to disregard all knowledge and information it may have about a particular subject. It has a right to bring to bear on the issue that information which it has acquired, from whatever source it may have come, but it has no right to decide a case from facts based solely upon an individual transaction of its own. The reason for this would be manifest, as it may have been an unfortunate transaction for the court, in which the court's mind may have differed from that of some other person, and which left a feeling which would be impossible to eradicate, and which would necessarily reflect itself in the court's judgment, if based upon its own individual transaction. It would be impossible for a litigant to controvert

facts in the court's mind or to distinguish the particular facts upon which the court based its opinion from the facts on trial before the court.

Our Supreme Court in the case of Duffy v. The People, 187 Ill. 357, in its opinion at page 361, says:

"The personal experience of the judge in another case was not a proper matter to put in the scales against defendants, and there was danger that innocent men might be convicted under the influence of an honest indignation excited by the personal observation of the judge of another assault made upon peaceable men without any justification."

It appeared from the facts in that case that the court during the course of the trial stated that he had seen a somewhat similar occurrence to the one involved and the court's remarks were based upon what he saw and heard at that time. Apparently in that case the judgment was not based upon the facts before him, but upon the particular incident to which he referred. While the case cited was a criminal case, we can see no difference in the logical conclusion to be deduced from such a statement by the court during the course of a proceeding, whether criminal or civil.

It is unfortunate that, in our opinion, the case will have to be re-tried, because the amount is small, but, nevertheless, without expressing any opinion on the facts, this court is of the opinion that the cause should be re-tried.

For that reason and the reasons expressed in this opinion, the judgment will be reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.
TAYLOR, P.J. AND HOLCOM, J. CONCUR.

171 - 31782

L. E. SCHMIDT,

Appellant,

v.

J. L. HANSE,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed November 23, 1927.

MR. JUSTICE WILSON delivered the opinion of the court.

This is a suit brought on a promissory note for \$500.00, with a provision therein for attorney's fees. The note was dated August 15, 1925, and was signed by the defendant and made payable to himself, with interest at 7 per cent per annum. Judgment by confession was entered on said note, which was a judgment note, and by agreement of parties the judgment was set aside and the cause proceeded to trial. On the hearing the note was introduced in evidence by the plaintiff, and on behalf of the defendant testimony was introduced showing that the defendant signed the note under an agreement with one McBride, which agreement was that they were to buy forty acres of land in Florida, and thereupon the note was delivered to the said McBride. Defendant testified that he received no consideration for the note, and that he went to McBride's office several times to get it back but was not successful.

On behalf of the plaintiff, one J. J. Moser testified that the plaintiff, Mr. L. E. Schmidt, had a claim against

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Opinion filed November 23, 1927.

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Das Bild ist eine Reproduktion eines Originals, das in der Sammlung der Universitätsbibliothek Bonn aufbewahrt wird.

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RECEIVED AND NOTED BY THE SECRETARY OF THE ARMY, WASHINGTON, D. C., 1944

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THE UNIVERSITY OF CHICAGO PRESS

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McBride for the sum of \$510.00, and that the said McBride satisfied that claim by endorsing said note, at Chicago, November 6, 1925, and delivering it to the plaintiff, and that thereupon the plaintiff cancelled his claim and took said note in payment thereof. There is nothing in the testimony to show that the plaintiff had an knowledge of the transaction surrounding the giving of the note, nor that he had any knowledge that it was without consideration. The note was dated August 15, 1925, and was payable one year after date, so that it was obtained by the plaintiff before maturity and without notice of the facts surrounding its issuance.

At the end of the testimony the court directed a verdict in favor of the defendant, and entered judgment accordingly. From this ruling of the court plaintiff has perfected this appeal, which defendant below has failed to follow.

This court in the case of Kuolt v. Garriotti, 202 Ill. App. 508, in its opinion at page 508 says:

"Every holder of a negotiable instrument is presumed to be a holder in due course in the absence of evidence to the contrary. Section 99, Art. IV, chap. 98, Rev. St. (J.S.A. par. 7695); Clarke v. Newton, 235 Ill. 230.

In order that a purchaser of a negotiable instrument shall be deemed not to hold it on 'due course,' it must appear that he had actual knowledge of the infirmity or defect complained of, or knowledge of such fact that his action in taking the instrument amounts to bad faith. Section 99, chap. 98, div. IV (J.S.A. par. 7695).

To the same effect is Wells v. Manufacturers & Merchants Life Assn., 213 Ill. App. 549.

The note was taken from McBride by plaintiff in

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satisfaction of a pre-existing debt from McBride to plaintiff. Moreover, at the time of the taking of the note plaintiff cancelled McBride's indebtedness, and, from anything that otherwise appears, may have ^{lost} the right of enforcing the payment of his claim by other means, and under the circumstances holds the note as an innocent purchaser for value. Gundlach Advertising Co. v. Hallam, 126 Ill. App. 280. The trial court in its instruction to the jury stated that there was no evidence to contradict the statement that the deal between the defendant Masse and McBride had never been consummated; and further stated that a bill marked "Paid" is only prima facie evidence of its payment. The answer is evident that it made no difference in the trial of the cause whether the deal between McBride and the defendant Masse was consummated or not, unless that fact had been brought to the attention of the plaintiff before the note had been endorsed over to him and before he had parted with any consideration for it, as the entire transaction happened prior to the maturity of the note. Moreover, while the trial court may be right in its assumption that payment is only prima facie evidence that a bill has been paid, nevertheless, there is no evidence in the record showing such fact is untrue. We are, therefore, of the opinion that the introduction of the note in evidence constituted a prima facie case, and that the burden was upon the defendant to show that the plaintiff received the note without knowledge of the surrounding circumstances attending its making and delivery; and that failing to do this, judgment should be entered for the plaintiff.

For the reasons announced in this opinion, the judgment of the Municipal Court will be reversed and judgment

[illegible]

entered here for appellant in the sum of \$577.00.

JUDGMENT REVERSED AND JUDGMENT HERE.

TAYLOR, P.J. AND HOLCOM, J. CONCUR.

APPROVED FOR THE BOARD OF DIRECTORS

THE BOARD OF DIRECTORS

JOHN J. WILSON, JR., PRESIDENT

ALBERT PICK & COMPANY,
a Corporation,)
 Appellee,)

vs.)

J. J. O'SHEA,)
 Appellant.)

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$12,255.55, entered by default after a second amended affidavit of merits attached to certain pleas of defendant had been stricken. The affidavit was stricken and judgment entered upon motion of the plaintiff.

The action was in assumpsit upon a promissory note. The declaration declared specially upon the note and the common counts were attached, together with a copy of the account sued on, which was verified by the affidavit of the plaintiff as provided by section 55 of the Practice act. The controlling question in the case is whether the second amended affidavit of merits set up the nature of a meritorious defense.

The pleas filed by defendant were: First - the general issue. Second - that the supposed promissory note was made without any good or valuable consideration, and also six other special pleas.

The affidavit of merits is made by Marvin A. Jersild, who describes himself as the "duly authorized agent in this behalf of J. J. O'Shea," and he alleges that he verily believes the said defendant has a good defense to the suit on the merits to the whole of the plaintiff's demand. The several defenses are stated in detail as described in the pleas, and if plaintiff in any one of these pleas set up a meritorious defense, it is apparent that the court erred in striking the pleas and entering judgment by default.

Irrespective of the merits of the contention as to others, we think that the second plea has thereby set up sufficiently the defense that the note was given without consideration. Matthiessen v. Duntley, 307 Ill. 36, would seem to be conclusive upon this point, and indeed the plaintiff seems to admit that the allegations in this affidavit and plea in this respect, standing alone, are sufficient, but contends that other matters are recited in the affidavit of merits from which it affirmatively appears that there was a consideration and that, since the affidavit of merits must be construed as a whole, the court should not disregard these allegations and be governed by the one statement that there was no consideration.

Plaintiff invokes the rule of law that pleading should be construed most strictly against the pleader. This is the undoubted rule where the sufficiency of the pleas are questioned by a demurrer, but that is not the method adopted here. On the contrary, the plaintiff made a motion to strike the affidavit and for judgment by default, and under a practice similar to that required in section 55 of the Practice act, the cases seem to hold that the only purpose of the affidavit is that the opposing party may be fully informed either of the character and nature of the claim, or of the defense thereto. (Orsinger v. Consolidated Flour Mills Co., 284 Fed. 234). Indeed, there are authorities which seem to hold that the affidavit of defense should be viewed in its most favorable light for defendant. (Moore v. Moore, 273 Fed. 1015); that judgment should be entered for a want of a sufficient affidavit of defense only in clear cases, (Federal Sales Company v. Farrell, 107 Atl. 669) and that such a motion for judgment searches only the subject matter of the affidavit to determine whether under a liberal construction a defense is averred of which a defendant may avail himself. (Dick v. Jullien, 279 Fed. 993.)

Moreover, contrary to the contention of the plaintiff, the Supreme Court of this state has held in American Hard Rubber Co.

Investigation of the merits of the contention as to which, we think
that the second place has thereby set up satisfactorily the balance
that the note was given without consideration. Waller v. Waller,
107 Ill. 38, would seem to be conclusively upon this point,
and indeed the difficulty seems to arise from the allegations in this
affidavit and also in this answer, standing alone, are satisfactory.
But certainly that other matters are involved in the affidavit of
which this case is affirmatively proven that there was a con-
sideration and that, since the affidavit of Waller must be con-
sidered as a whole, the court should not disregard those allegations
and be governed by the one statement that there was no consideration.
Waller's answer involves the rule of law that pleading should
be construed most strictly against the pleader. This is the rule
applied where the sufficiency of the plea is questioned by a
demurrer, but that is not the method adopted here. On the contrary,
the plaintiff made a motion to strike the affidavit and the judgment
of the court, and under a previous ruling he was permitted to withdraw
it of the practice was, the court seems to hold that the only purpose
of the affidavit is that the opposing party may be fully informed
either of the character and extent of the claim, or of the defense
thereof. Waller v. Waller, 107 Ill. 38, was held that.
Indeed, there are authorities which seem to hold that the affidavit
of defense should be viewed in its most favorable light for defense-
not. (Waller v. Waller, 107 Ill. 38); that judgment should be entered
for a want of a sufficient affidavit of defense only in clear cases,
Waller v. Waller, 107 Ill. 38, and that such a
motion for judgment notwithstanding the verdict matter of the affida-
vit to determine whether under a liberal construction a defense is
averted or unless a defendant may well himself. (Waller v. Waller,
107 Ill. 38.)

However, contrary to the contention of the plaintiff,
the Supreme Court of this state has held in Waller v. Waller, 107 Ill. 38.

v. Hays, 280 Ill. 431:

"It is the law**** that a pleading consisting of several parts, counts or pleas is good if any portion or paragraph thereof sets up a legal defense or a legal claim. (Knapp, Stewart & Co. v. Hays, 181 Ill. 392; Fitch v. Knight, 4 Conn. 21.) If such defenses or claims are set forth in the same plea or count no advantage can be taken of the fact of duplicity, without special complaint thereof, by demurrer or otherwise. The motion to strike the affidavit of merits in this case was general and gave no notice of other than general objections, - that is, only notice that it stated no defense whatever."

Without discussing the merits of other points raised, we think that the affidavit of merits set up a meritorious defense of no consideration; that the court erred in striking the affidavit and entering judgment for the plaintiff, ^{for} and that error the judgment is reversed and the cause remanded.

REVEREND AND REMANDED.

O'Connor and McShurely, JJ., concur.

246 I.A. 625³

BERTHA A. SCHILL,
Appellant,

vs.

FRANK STONEY, ALFRED HAMBURGER,
INC., and LEON KIRK, doing business
as LEON KIRK & SON,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HATCHETT

DELIVERED THE OPINION OF THE COURT.

The record in this case discloses that on September 14, 1925, the plaintiff began suit in the Circuit court in an action of trespass, claiming damages to the amount of \$10,000; that on the same day a summons issued out of the court returnable on the third Monday of October, 1925; that defendant Michael Roth was duly served on September 15, 1925. Alfred Hamburger, Incorporated, a corporation, and Leon Kirk, doing business, etc., were served on September 16, 1925, and defendant Frank Stoney was served on September 17, 1925. On October 18, 1925, plaintiff filed a declaration. On October 19th the appearance of Alfred Hamburger, Incorporated, was entered by Mark Goodman as its attorney, and on the same day the appearances of Michael Roth, Alfred Hamburger, Incorporated, and Leon Kirk were entered by one W. J. Roach, purporting to act as their attorney.

On October 23th the default of the defendant Stoney was entered. On November 3, 1926, an order was entered dismissing the suit as to defendant Michael Roth, and on the same day a jury was empanelled ex parte, which returned a verdict finding the defendants guilty and assessing the plaintiff's damages at \$3675, and judgment was entered upon the verdict.

A writ of figi facias issued on this judgment November 17, 1926, and a demand thereunder was made on Alfred Hamburger, In-

corporated, December 15, 1936; on Frank Stoney December 9, 1936; and on Leon Kirk December 10, 1936. This writ was returned unsatisfied as to each and all the judgment debtors.

On December 31, 1936, (being at a term of the court subsequent to that at which judgment was entered) motions were filed by the defendants to set aside the judgment and verdict of the jury and for leave to appear and plead. The motions were supported by affidavits of the judgment debtors, to which the plaintiff filed general demurrers. The court ordered that the judgment be set aside. From that order this appeal is prosecuted.

An examination of the affidavits discloses that the alleged error of fact relied upon was that M. J. Roach, who entered his appearance for the defendants and filed the plea in their behalf, was not in fact an attorney at law, and that he as a matter of fact was assuming to practice law without a license.

The question to be decided therefore is whether a defendant, who has in good faith filed an appearance and plea through one purporting to act as his attorney but who was not in fact licensed, may for that reason have a judgment set aside after the expiration of the term at which it was entered by a motion under section 89 of the Practice act.

The trial court was of the opinion that the judgment could be set aside in such a proceeding, and the defendants in this court so contend, relying upon Crane v. Nelson, 37 Ill. App. 397. In that case it appeared that on August 14, 1888, one of the parties filed in the office of the Clerk of the Superior court a bond for appeal from a judgment by a justice of the peace, the defendant also filing a transcript and other papers. On February 20, 1896, the appearance of the appellee was entered by one professing to be an attorney, and on the following day the case was called for trial and the appeal dismissed for want of prosecution. At a subsequent term the appellant moved to reinstate the case; his motion was denied and

...on June 11, 1964, this was the first time...

On December 11, 1946, (being at a date of the court
proceedings) the said witness was present and testified
by the testimony to not recall the names and details of the jury
and the leave to appear and stand. The witness was requested by
the officials of the Government to stand and testify at the
proceedings. The witness refused to stand and testify at the
proceedings. The witness was present at the proceedings.

An examination of the exhibits disclosed that the al-

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he appealed. The court held that the affidavit submitted in support of the motion was not sufficient to establish the alleged fact that the attorney who entered the appearance of the appellee was not entitled to practice law, but stated, citing Robb v. Smith, 3 Conn. 46; Howard v. Adams, 5 Burr. 2660, that it might be admitted that if the fact had been made to appear that the appearance of the appellee was entered by one who was not an attorney at law, the action of the court based upon the assumption that he was such an attorney would be error in fact. It is apparent that the question which we must here decide was not necessary to a decision of that case. Moreover, an examination of that case discloses that the jurisdiction of the court there (unlike this case) depended upon the entry of an appearance by an attorney, as there was no personal service.

However, even if it is conceded that the appearance in court for a defendant by one claiming to be an attorney when he was not in fact licensed, might constitute a mistake of fact insofar as the trial court was concerned, it would by no means follow that the mistake or error of fact would be such as could be corrected upon a motion of this character. As was stated in Gould v. Watson, 30 Ill. App. 242, an error of fact in order to be availed of under this proceeding, "must be matter not part of the issues tried by the court, but something aliunde, which, if presented to the court at the trial would have absolutely precluded the judgment as rendered and not a fact merely bearing upon the issues adjudged, however conclusive it might be of such issues." This case was cited with approval in Green v. Union Elevated R. R. Co., 118 Ill. App. 1, where the trial court denied a motion of this nature made to reinstate a cause where the attorney for the plaintiff died and the cause, without knowledge on the part either of the plaintiff or of the court, was dismissed. This court said that these facts would not have absolutely precluded the entry of judgment as ren-

the material. The court held that the affidavit submitted in support of the motion was not sufficient to establish the allegations that the attorney had entered the appearance of the respondent was not entitled to question him, but stated, citing Boyle v. Wilson, 100 Cal. 18; Boyle v. Wilson, 20 Cal. 2d 18, that it might be said that if the fact had been made to appear that the appearance of the respondent was entered by one who was not an attorney at law, the matter of the court would then be the question of the fact as to whether or not the court would be error in fact. It is apparent that the question which we must here decide was not necessarily a question of fact alone. Moreover, in examination of that case discloses that the jurisdiction of the court there (which this court deemed was the only of its jurisdiction by its authority, as stated in the court's opinion.

However, even if it is conceded that the appearance in court for defendant by one claiming to be an attorney who is not in fact a lawyer, might constitute a violation of the rules of the trial court was concerned, it might by no means follow that the mistake or error of fact would be such as could be corrected upon a motion of this character. It was stated in Boyle v. Wilson, 100 Cal. 18, 20 Cal. 2d 18, an error of fact is not to be corrected by motion. This proceeding "must be within the purview of the issues raised by the court, but notwithstanding this, it is provided in the rules of the trial would have absolutely precluded the defendant as being heard and not a fact merely pending upon the issues raised, but over something it might be of such issues." This case was cited with approval in Boyle v. Wilson, 100 Cal. 18, 20 Cal. 2d 18, 19, where the trial court denied a motion of this nature made in substance a cause where the attorney for the plaintiff did not appear, without knowledge on the part of the court of the plaintiff or of the court, was dismissed. This court said that these facts would not have absolutely precluded the entry of judgment in favor

dared had the court deemed such a judgment proper; that the court had power to act as it did without reference to an appearance by an attorney, and that the court therefore properly denied the plaintiff's motion to reinstate the case. Again, the Supreme court of this state, after great consideration, decided in the case of Karabie v. Thompson Hospital, 309 Ill. 153, that the remedy by means of a motion of this nature has not been extended so as to permit a party to avail himself of equitable rights, but that such a party is strictly limited to such cases as might have justified at common law the issuance of a writ of error coram nobis. As we understand it, at common law this writ was limited, first, to cases in which, unknown to the court, there existed disability or incapacity of the parties to the suit, such as infancy, coverture, death of one or more of the parties, death of a joint party or insanity; or, second, to cases where there was some error in the process or proceeding through default or misprision of the clerk or similar officer. (Bronsen v. Schulten, 104 U. S. 417.)

The affidavits here do not disclose any such error or errors of fact. Process having been duly served, the court had jurisdiction to enter the judgment. Indeed, we think it would not be unreasonable to hold that defendants were negligent in securing and permitting an unlicensed person to appear as their attorney.

The order appealed from is therefore reversed and the matter remanded.

REVERSED AND REMANDED.

O'Connor and McBurely, JJ., concur.

The order appointing them as sherrifes returned and the
and existing an collection return to them as their attorney.
be apprehensible to hold that delinquents were negligent in securing
intentional in what the defendant. Indeed, we think it well and
errors of fact. Process having been duly served, the court had
The affidavit date to not disclose any such error or
officer. (Exhibit A. Sub. 1. 100 N. W. 417.)

Accordingly, the court held that the defendant was liable for the same
or, second, to cause there was some error in the process or
it one or more of the parties, each of a joint party or liability;
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of common law the payment of a bill of exchange. As we
a party is strictly limited to such cases as might have resulted
overall a party to waive himself of available relief, but that such
status of a notice of this nature has not been entered as an ac
Exhibit A. Sub. 1. 100 N. W. 417, that the party by
of this order, after great consideration, decided in the case of
defendant's failure to perform his duty. Indeed, the sherrif was
an attorney, and that the court therefore properly denied the
and power to act as if his without reference to an appointment by
court had the court seemed such a judgment proper; that the court

O'Connor and Lafferty, 1970

HERMAN SCHNEIDER and
 FLORENCE SCHNEIDER,
 Appellees,

vs.

SOPHIA G. WHEDE,
 Appellant.

APPEAL FROM SUPERIOR COURT
 OF COOK COUNTY.

MR. PRESIDING JUSTICE MARCHETT
 DELIVERED THE OPINION OF THE COURT.

Upon trial by jury the plaintiffs had a verdict for the sum of \$12,000, upon which the court, over-ruling the motion of the defendant for a new trial, entered judgment.

The declaration alleged that the plaintiffs agreed to buy from the defendant certain real estate and paid to the defendant \$12,000 upon the purchase price, that the defendant refused to complete the sale and refused to return the money paid on the purchase price when demanded. In a second count the plaintiffs alleged that the defendant was the owner of certain premises known as 5913 Magnolia avenue in Chicago, which she offered for sale, and that the plaintiffs on January 22, 1924, entered into a written contract for the purchase of these premises for the sum of \$22,000; that the plaintiffs deposited \$12,000 with the defendant as a part of the purchase price; that the defendant thereafter failed to deliver the premises to the plaintiffs and refused to return the \$12,000. The declaration also contained the common counts.

The defendant filed a plea of the general issue and a special plea denying that she executed and delivered the contract in plaintiffs' declaration mentioned.

The defendant argues that the court erred in refusing an instruction requested at the close of all the evidence to find in favor of the defendant, and she argues that the verdict and judgment are contrary to the law and against the manifest weight of the evi-

dence, and further that the court erred in refusing certain instructions requested by the defendant.

The evidence tends to show that the defendant was the owner of the premises known as 5915 Magnolia avenue in Chicago, which were improved by a three-flat building; that the plaintiffs desired to purchase such a building, and that in response to an advertisement they called upon one Joseph L. Rubey, who was in the real estate business, with reference thereto; that the plaintiffs had dealt with Rubey before, and that he was also known to the defendant; that the plaintiffs were taken to the premises owned by the defendant by Rubey in June, 1932; that at that time the plaintiffs, Rubey and the defendant were present; and that the defendant then said that she wanted \$21,000 for the building; that the plaintiffs did not care to purchase at that price, and that they did not see the defendant again until about October 24, 1932; that at that time they went to the premises in question and took some measurements for the purpose of determining how many cars could be put in there; that the defendant owner, Mrs. Wrede, came up from the basement and told them, as Mrs. Schneider testifies, "Mr. Rubey is the only man that can sell my building," or, as Mr. Schneider says, "It is no use to measure the house because there is nobody can sell this building but Rubey."

Three or four days later Rubey came to the home of the plaintiffs and, according to the testimony of both the plaintiffs, a price of \$22,000 was agreed upon. The plaintiffs then paid him \$2500 as a deposit. About the second week in January, according to the testimony of Mrs. Schneider, Rubey again came to their house and they went with him to the premises of Mrs. Wrede, the defendant, and she showed them the second apartment and said to the woman in the second apartment, "This is going to be your new landlord." The lady in the second apartment spoke to the plaintiffs about some electric lights that she was having trouble with and Mr. Schneider

...and, and further that the court order in reference to the ...
...is ...

The evidence tends to show that the defendant was the
owner of the premises known as 1015 ...
were removed by a three-day ...
to purchase such a building, and that in response to an advertisement
they called upon one Joseph L. Ruby, who was in the real estate
business, with reference thereto; that the plaintiff had dealt
with Ruby before, and that he was also known to the defendant; that
the plaintiff's were taken to the premises owned by the defendant by
Ruby in June, 1933; that at that time the plaintiff, Ruby and the
defendant were present; and that the defendant then said that she
wanted \$21,000 for the building; that the plaintiff's did not care to
purchase at that price, and that they did not see the defendant again
until about October 24, 1933; that at that time they went to the
premises in question and took some measurements for the purpose of
determining how many cars could be put in there; that the defendant
owner, Mrs. Wade, came up from the basement and told them, as Mrs.
defendant testified, "Mr. Ruby is the only man that can sell my
building," or, as Mr. defendant says, "It is no use to measure the
basement because that is nobody's and will not be selling but Ruby."
Three or four days later Ruby came to the house of the
plaintiff and, according to the testimony of both the plaintiff's,
price of \$21,000 was agreed upon. The plaintiff's then paid him \$2000
as a deposit. About the second week in January, according to the
testimony of Mrs. defendant, Ruby again came to their house and
they went with him to the premises of Mrs. Wade, the defendant, and
she showed them the second agreement and said to the women in the
second agreement, "This is going to be your new building." The
fact in the second agreement tends to show plaintiff's about same
plaintiff's like that and was having trouble with Mrs. defendant

said that he would fix that up "when we get the building." On January 22nd Rubey again came to the home of the plaintiffs and told them that he was buying another place for the defendant, Mrs. Wrede, and at that time the plaintiffs made an additional payment of \$9,500 and Rubey delivered a receipt to them as follows:

"No. 1923. THE STRONGEST FIRE INSURANCE COMPANIES REPRESENTED.
"Chicago, Jan. 22nd, 1924.

"Received of H. A. & Florence Schneider the sum of Twelve Thousand Dollars (\$12,000.00) as earnest money, pursuant to a Real Estate Contract of even date for the purchase of the premises commonly known and described as 5915 Magnolia Ave. by the said Florence Schneider from Sophia G. Wrede and.....

"Said earnest money to be returned in the event the consideration, terms and conditions as set forth in said Contract are not accepted by owners of said premises within ten days hereof.

"Jos. L. Rubey
"By J. L. R."

At that time a contract was also signed, Rubey signing his name to it and the plaintiffs signing their names to it.

Mrs. Schneider further testified that after January 22nd the defendant, Mrs. Wrede, came to her and told her that she had already signed the papers and asked her to buy the living room rugs for \$90 and her dining room set for \$50. She said (and she is corroborated by Mr. Schneider) that defendant said she felt "like an orphan." Shortly thereafter the defendant delivered an abstract of the property to Rubey for the purpose of having the same brought down in order to show title to the property. From time to time Rubey put the matter off when requested to produce the abstract, and he finally absconded on or about August 20, 1924.

The controlling question of fact in the case, which was properly submitted to the jury, was whether Rubey was the agent of the defendant, who was authorized to receive payments for the property or merely a real estate broker having no such authority. The defendant rather reluctantly admitted that she had refused to turn over at the time of the trial and still retained \$500 of the money paid to Rubey; she denied, however, that she had told the plaintiffs that Rubey was the only man who could sell her property, and the

defendant produced a written contract which provided for the sale of the property to the plaintiff Florence Schneider, but in which the authority of Rubey to hold the contract and to receive payment, etc., had been stricken out. Her attorney, who withdrew from the case in order to testify, said that certain erasures had been made by him in the presence of Rubey before the contract was signed by the defendant. This writing, however, does not bear the signatures of the plaintiffs and the jury had a right to believe from the testimony (if it did so believe) that it was not the contract which the plaintiffs testified was executed on January 22, 1924.

In view of the facts which we have related it was of course impossible for the trial court to say, as a matter of law, that Rubey was not the agent of the defendant, since there was positive evidence of the plaintiffs to the effect that the defendant had directed them to him as the only one having authority, and the further fact that all the circumstances in the case indicated that the entire matter was left by her to be arranged through Rubey. Neither is this court able to find that the evidence manifestly preponderates in favor of the defendant. The jury and the trial Judge saw and heard the witnesses, and after a careful examination of the defendant's testimony we are not able to say that the jury acted unreasonably in accepting the version of the transaction as related by the plaintiffs.

It is urged that the court erred in refusing to instruct the jury that the plaintiffs could not recover unless they proved by a preponderance of the evidence that the defendant gave power and authority to Rubey to receive the money alleged to have been paid to him. The court did not err in this respect, for, as was stated by the Supreme Court in Faber-Wysser v. Deo Clay Co., 291 Ill. 240 -

testimony of the witness who testified that the wife
of the deceased was the plaintiff's daughter, and that she
was the wife of the deceased and in January 1934
went, she, had been married to the deceased, who although
from the same in order to testify, said that certain evidence had
been given by him in the presence of the deceased and the witness was
signed by the defendant. This witness, however, does not bear the
signature of the plaintiff and the jury had a right to believe
that the testimony (if it is as believed) that it was not the con-
tinent which the plaintiff testified was recorded on January 22,
1934.

In view of the facts which we have related in view of
evidence furnished for the trial court to say, as a matter of fact,
that the wife was not the agent of the defendant, since there was
positive evidence of the plaintiff on the witness stand that the de-
fendant had testified that he was the only one having authority,
and the further fact that all the circumstances in the case indicated
that the entire matter was left to him to be arranged through the
plaintiff is this court able to find that the evidence conclusively pro-
pounded in favor of the defendant. The jury and the trial judge
can and must see the evidence, and after a careful examination of the
defendant's testimony we cannot find it any less than fairly stated
unreasonably in changing the version of the prosecution as related
by the plaintiff.

It is urged that the court acted in refusing to in-
struct the jury that the plaintiff's conduct was proper under the law
proved by a preponderance of the evidence that the defendant gave
notice and authority to the jury to receive the money alleged to have
been paid to him. The court has not put in this regard, for, as
was stated by the court in People v. ...

"The law is well settled that a principal is bound actually by the authority which he actually gives his agent and by that which by his own acts he appears to give."

The defendant also requested the court to instruct the jury that if it believed from the evidence that a copy of the contract in evidence, dated January 22, 1924, was executed by Mrs. Schneider and Mrs. Wrede, then, as a matter of law, this contract gave no power or authority to Rubey to receive the money as agent for Mrs. Wrede, and that in such case the verdict should be for the defendant. It was not error to refuse this instruction, since it directed a verdict while disregarding plaintiffs' theory of the case.

It is a matter of regret that either of these parties should be required to sustain such heavy loss as the result of misplaced confidence in this scoundrel, but the jury, whose verdict has been approved by the trial Judge, has found that the scoundrel was the authorized agent of the defendant, and the defendant must therefore bear the loss.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

...the law is well settled that a defendant is bound to
...the evidence is not sufficient to establish his guilt and by law
...the jury is not to be bound to believe the evidence.

The defendant also requested the court to instruct the
jury that it is the duty of the jury to believe the evidence
presented to them, unless it is so clearly against the defendant
that they cannot believe it. The court refused to give this
instruction. The defendant also requested the court to instruct
the jury that they are to believe the evidence unless it is so
clearly against the defendant that they cannot believe it. The
court refused to give this instruction. The defendant also
requested the court to instruct the jury that they are to
believe the evidence unless it is so clearly against the
defendant that they cannot believe it. The court refused to
give this instruction. The defendant also requested the court
to instruct the jury that they are to believe the evidence
unless it is so clearly against the defendant that they cannot
believe it. The court refused to give this instruction.

The judgment is affirmed.

ATTORNEY.

Witness my hand and seal, this 17th day of June, 1911.

THEODORE V. JAMNIA, a Minor, etc.,
Appellee,

vs.

PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The defendant seeks by this appeal to reverse a judgment for the sum of \$20,000 entered upon the verdict of a jury. The declaration was in three counts and in varied language charged that on August 18, 1924, the plaintiff was injured as a result of the negligence of the defendant in permitting certain high power electrical wires suspended on poles, which it controlled, maintained and used for the purpose of conveying dangerous and powerful currents of electricity, to become weak, worn, defective and insecure, whereby the same broke and came apart and fell upon the ground and against the plaintiff injuring him, while he was in the exercise of due care.

The defendant argues that the jury should have been instructed to find for the defendant and that defendant's motion in arrest of judgment should have been granted. It urges that there was no general charge of negligence in the declaration and that the doctrine of res ipsa loquitur was therefore inapplicable, while there was no evidence tending to sustain specific charges of negligence.

We are not impressed by these contentions. The fact that defendant's wires broke and fell is not disputed. There was other proof of facts tending to show inherent weakness of these wires at the places they parted. These facts were explained by

1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 26

• **STAYING POWER** — 2000-2001

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DATE 08-10-2001 BY 60322 UCBAW

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FORM NO. 10-62 (REV. 1-62)

[illegible]

It seems to me that the only way to control our life is to control our mind.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines.

CONFIDENTIAL

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[illegible]

and you'll find that all your people are all

At 10:00 a.m. on 10/10/1918, the following were present: Mr. J. H. ...

of the same nature as the above, and was found to be of the same nature as the above.

It shall be the responsibility of the contractor to ensure that the work is completed in accordance with the schedule of work.

Source: U.S. Census Bureau, *Current Population Reports*, 1990.

2000年12月20日 星期三 12:00:00

Don't tell me, I'm not a doctor.

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Subject: [REDACTED]

of the same kind as the one in the first case.

expert testimony. If the jury believed these facts to be true, it could reasonably find the specific negligence charged was proved. It is therefore unimportant whether the technical doctrine of res ipsa loquitur is applicable.

The controlling question in the case (the decision of which has not been made without difficulty) is whether the verdict is manifestly against the weight of the evidence. If it is, the court should have granted a new trial.

The accident occurred August 18, 1924, in the Village of Waukegan between six and seven o'clock in the afternoon, near the intersection of McAllister avenue, Liberty and Melvidere streets in that city. McAllister avenue is a public highway running in a general northerly and southerly direction. Liberty street is a public highway running in a general easterly and westerly direction but slightly to the southeast. Melvidere street intersects both McAllister avenue and Liberty street, running in a northeasterly and southwesterly direction. McAllister avenue and Liberty street formed a sharp corner. Liberty street was about 66 feet wide, measured from the outer edge of the sidewalk on either side of the street. The sidewalk was 5 feet 4 inches wide. There was a parkway between the sidewalk and the curb which was 13 feet 8 inches wide. The sidewalks and the parkways were of the same width on both sides of the street.

The defendant owned, operated and controlled two high tension power lines, used for the transmission of electric current, which lines were attached to poles extending along Liberty street. One of these poles was located practically in the apex of the intersection of McAllister avenue and Liberty street near the south side of Liberty street. One hundred twenty feet east of this pole was another pole on the north side of Liberty street. The poles were set between the sidewalk and the curb. These poles were about 40 feet long and were set about six feet in the ground. At the top

of each pole was a crossarm and three feet below was another crossarm which was 30 feet from the ground. Three of defendant's wires were attached to the upper crossarm and three to the lower. The lines on the upper crossarm carried a pressure of 33,000 volts, the one below a pressure of 13,000 volts. Nine feet below the lower crossarm was a telephone line. The crossarms were made of two pieces placed on either side of the pole and parallel with each other on the same elevation. A forged steel pin was placed in each crossarm and a porcelain insulator screwed on the pin. The wires were tied onto the porcelain insulator with another piece of wire known as the tie wire, and that tie wire was passed around the high tension wire to hold it onto the insulator, and it was passed around the insulator and wrapped around the other wire about four or five turns on each side. These porcelain insulators were of baked porcelain, made in three sections, three layers cemented together and baked.

The three wires on the topmost crossarm were approximately three-teenths of an inch in diameter and weighed about a quarter of a pound per lineal foot with the weather insulation on. The tensile strength of these wires was approximately 3,000 pounds. Two of the wires were on the north side of the post and one wire on the south side, and all three of the wires were on the same horizontal plane. The two wires on the north side of the post were three feet apart, and the one on the south side was six feet from the nearest wire on the north side of the post. On the crossarm below were three wires mounted in the same manner as those on the top crossarm. The diameter of the wires on the lower crossarm was over half an inch each. The weight of the same was about three-quarters of a pound per lineal foot. The tensile strength of these wires was approximately 10,000 pounds.

The plaintiff lived with his father and mother in a

of each pole was a crossbar and three feet below was another cross-
bar which was 30 feet from the ground. Three of defendant's wires
were attached to the upper crossbar and three to the lower. The
lines on the lower crossbar carried a pressure of 35,000 volts,
the one below a pressure of 25,000 volts. Nine feet below the
lower crossbar was a telephone line. The crossbars were made of
two pieces placed on either side of the pole and bolted with
steel wires on the same elevation. A large steel pin was placed
in each crossbar and a porcelain insulator attached on the pin.
The wires were tied onto the porcelain insulator with another
piece of wire known as the tie wire, and each pin was placed
around the high tension wire so that it could be inspected, and it
was found around the insulator and around the tie wire
about four or five times on each side. These porcelain insulators
were of about porcelain, made in three sections, three having be-
come attached together and fused.
The three wires on the lowest crossbar were approxi-
mately three-feet from the pole to the crossbar and attached about a
quarter of a pound per linear foot with the weather insulation on.
The insulator between the wires was approximately 1 1/2 feet apart.
Two of the wires were on the north side of the pole and the wire
on the south side, and all three of the wires were on the same
horizontal plane. The two wires on the north side of the pole
were three feet apart, and the one on the south side was six feet
from the nearest wire on the north side of the pole. In the cross-
bar below were three wires spaced in the same manner as those on
the top crossbar. The distance of the wires on the lower crossbar
was about half an inch apart. The weight of the wires was about three
pounds of a pound per linear foot. The insulator between the
wires was approximately 2 1/2 feet apart.
The plaintiff lived with his father and mother in a

house on the south side of Liberty street about 60 feet east of the west pole which stood at the intersection. Just prior to the accident a young man named Roy Burris called for plaintiff and it was proposed that the two might go to a show that evening. Plaintiff says he walked north out toward the street. He walked near the slope of the street down towards the sidewalk, and he says that when he was at the bank of the sidewalk he saw a sparking of the wires above and the next he knew a wire came down and hit him; that he threw up his hands; that the flash when he saw it was on the wires of the second crossarm; that the wire rolled toward him like a big loop; that the end of it hit him, and the next he remembered he was in bed at the hospital.

An examination there disclosed that plaintiff had sustained severe burns on the right side extending from the axilla down to the crest of the ilium or hip bone. These burns extended about fifteen or sixteen inches across his side. There was a burn on the right arm extending from the elbow down to the palm of the hand just to the wrist, about a half inch to the inner side. There was a little discoloration on the thumb due, in the opinion of the attending physician, to the burn above, this burn extending about a half inch on the palm of the right hand on the little finger side. There were similar burns on the left hand. These were classified as second degree burns, that is, burns which penetrate the skin, in through the skin and to the deep layer of the skin. A burn was also disclosed on the right leg extending down to the internal malleolus on the inside of the foot, the ankle and the leg. A burn extended about five inches up the left leg and was somewhat severe at the ankle joint. There was a burn about the center of the foot, the plantar surface of the foot, about two inches down at the bottom of the foot in line with the big toe, and a burn on the big toe of the left foot. The right foot and leg had a burn on the

There is the small side of liberty direct about 60 feet east of the
west side with about 10 feet of the investigation. Just north of the en-
closed a young man named Ray Harris called for assistance and it
was proposed that the two might go for a walk last evening. When
Ray says he called Harris and Harris says he called Ray. The witness says
the shape of the object from below is not identical, and he says that
when he was at the point of the sidewalk he saw a building of the
which shows that the road is now a wide road and that this is the
he shows on the ground; that the house when he was in was on the
view of the second occurrence; that the view looking toward him was
the house; that the end of it is him, and the house is somewhat
he was in fact at the building.
An association where the witness that witness had seen
faded across below on the right side extending from the middle
down to the level of the floor of his house. There were a number
about fifteen or sixteen houses across his side. There was a house
on the right side extending from the middle down to the point of the
ground level on the right, about a half inch in the lower side. There
was a little association on the ground too, in the opinion of the
witness, which appeared, in the lower side, this house extending about a
half inch on the side of the road and on the little house also.
There were other houses on the left side. There were a number
on the right side, but he does not know the names of the
through the side and to the back level of the side. A house was
also located on the right side, extending from the bottom
extension on the ground of the house, the middle and the left. A
house extended about five feet on the left side and was numbered
anyway at the middle level. There was a house about the center of the
road, the ground surface of the road, about two feet from the
point of the road in front of the big tree, and a house on the big
foot of the left foot. The right foot and left foot had a house on

plantar surface about the arch of the instep of about an inch in diameter, and there was another slight burn down toward the big toe of about two inches. In process of time there was a sloughing of the bones or of the tendons and muscles on the foot, and about the first of September a large abscess formed about three or four inches above the ankle joint. A few days thereafter the attending surgeon decided that it was necessary to amputate the left leg below the knee, which was done, and later plaintiff underwent a re-amputation of the same leg.

Several witnesses testified that on several occasions prior to the accident they had seen sparks from the wires near to the west pole and near to the places at which (an examination made after the accident by defendant's employees showed) three of the wires broke. Two of these wires were the most northerly ones attached to the top crossarm, and the other, the north wire, attached to the lower crossarm. The system of the defendant had been constructed for about thirteen years, and it was the duty of one of its employees to inspect about thirteen miles of these transmission wires. This employee testified that he did not remember ever having reported any defect in the system at this place. His reports, however, were made in writing and the reports covering the time in question had been destroyed.

The theory of the defense was that the plaintiff received these injuries and that the wires broke and fell as a result of a kite string coming in contact with the transmission wires. The evidence offered in its behalf tends to show that the plaintiff was flying a kite at the time that he received his injuries. The uncontradicted evidence shows that at this particular time a kite was flying to the north of Liberty street and that the kite was attached to a string, which the plaintiff contends and which evidence offered in his behalf tends to show, was fastened to a stake some twenty feet east of the east line of the lot on which his

Witness further about the time of the injury of about an hour in
 witness, and about the same time about the time
 the it about the time. In witness of this there was a description
 of the house or of the garden and situated on the road, and about
 the time it happened a large crowd of people about the time of the
 incident about the same time. A few days afterwards the attending
 witness further that it was necessary to describe the fact that
 below the house, and about the time, and about the time, and about the time
 happened of the same fact.

Witness further testified that on several occasions
 after to the position they had been exposed from the time they to
 the west side and next to the house at which the witness had
 after the accident by defendant's employees (shown of the
 witness further. The witness further that the witness further that
 attended to the fact of the witness, and the witness further that
 further to the fact of the witness. The witness further that the witness
 concerned for about fifteen years, and it was the fact of one of
 his employees to suggest which witness further that the witness further
 witness. This employee testified that he did not remember ever having
 testified up to the fact of the witness. His further, and
 over, were made in witness, and the witness further that the fact
 question had been answered.

The result of the witness was that the witness further
 witness from further that the witness further that the witness further
 at a time which was in contact with the witness further that the
 witness further that the witness further that the witness further that
 giving a list of the time that he received his injuries. The witness
 contradicted witness further that at this point the witness further that
 was giving to the fact of the witness further that the witness further
 witness to a story, which the witness further that the witness further
 witness further that the witness further that the witness further that
 some twenty feet east of the fact line of the fact on which his

home was located. About 300 feet north of the intersection of these three streets and northeast of Belvidere street was a school-house yard known as the Cook school grounds. To the east of this was a frame dwelling known as Vin Savage's house, and the evidence offered in behalf of defendant shows that the kite just prior to the accident was flying above Vin Savage's house. The kite had been found that afternoon in the school yard by the brother of plaintiff, a boy about sixteen years of age. At the time he found it there was attached to it a cotton string about 75 feet in length. The lad procured from his home some wire, which the evidence shows is technically known as No. 22 radio wire, and this was attached to the cotton string. As already stated, it was either fastened to the stake or held by plaintiff. Just prior to the time of the accident the kite was flying at a height of about 75 feet, being held by this combined cotton string and radio wire.

The important question of whether the radio wire was rolled on a wooden spool and held by the plaintiff in his hands with his thumbs up (as defendant's witnesses say) or fastened to a stake in the ground (as the testimony for the plaintiff tends to show), is one of the issues of fact in this case upon which the evidence is in direct conflict. It must be conceded that either the one set of witnesses or the other are not telling the truth. Burris, a companion of the plaintiff and former schoolmate, says that plaintiff held the radio wire which was wound around a wooden spool; that he held the spool in both hands with his thumbs up; that just a moment before the explosion occurred, the witness warned plaintiff that if the radio wire should happen to touch the public service wires, plaintiff would be a "goner," and he also says that he saw the kite wire sweep down and touch one of the wires of the defendant company, and that this was immediately followed by an explosion and the injury of the plaintiff. He says that after

There was located. About 200 feet north of the intersection of these three streets and northwest of Highway Street was a small house built upon on the back corner of the lot. To the east of this was a frame dwelling known as the Weaver's house, and the evidence offered in behalf of defendant was that the wife first to the witness was lying above the Weaver's house. The wife had been found that afternoon in the school yard by the brother of defendant, a boy about sixteen years of age. At the time he found it there was attached to it a cotton string about 75 feet in length. The fact presented from this house some wire, which was evidence above is substantially known to be. The wife was, and this was attached to the cotton string. An already stated, it was found attached to the stake or held by defendant. This string at the time of the evidence was lying at a height of about 75 feet, being held by this combined cotton string and radio wire.

The defendant presented of evidence that the radio wire was rolled on a wooden spool and held up by the witness in his hands with his thumb up (as defendant's witness says) on the left to a stake in the ground (as the defendant says) on the right (as the witness says). It was at the time of that it was found with the evidence in it. It must be concluded that either the one set of witnesses or the other was not telling the truth. But, a comparison of the defendant and former witnesses, says that defendant said the radio wire was found wound around a wooden spool; that he said the spool is now found with his thumb up; that just a moment before the evidence occurred, the witness wanted defendant that if the radio wire should happen to touch the radio circuit wires, defendant would be a "gunner," and he also says that he saw the wife wrap down and touch one of the wires of the defendant's wire, and that this was immediately followed by an explosion and the injury of the defendant. He says that when

plaintiff was injured he assisted in taking off his shoes and that he rode with him to the hospital. He is in part corroborated by two or three other witnesses. His testimony is positively contradicted by plaintiff, by plaintiff's brother Ludwig and by Jack Behn, who, the evidence shows, took plaintiff to the hospital in his automobile. Behn says that Purrie did not ride with him to the hospital. After the accident the kite was picked up by John Olson, a lad about thirteen years of age, who with his brother Edward was flying kites in the yard of the Cook school just before the accident. Edward Olson says that at the time of the accident the first flash drew his attention; that he turned around and saw two more flashes. He says that his brother got hold of the copper wires attached to the kite first; that when he got hold of it the copper wire was dragging on the ground; that the kite was in the air and the wire dragging on the ground. John Olson says that he heard a noise or flash just before the accident happened and right after it saw a kite flying in the air over Vin Savage's house; that it went clear across the street from where the men were, and that it was flying up in the air about forty-five or fifty feet high. He says, however, that he did not see any one in Janaha's yard holding the kite string.

The string and the wire which the Olson boy picked up are in evidence and attached to the record as exhibits. An examination fails to disclose any burning out of any part of the wire. The brother of plaintiff testified that the live wire which hit his brother also hit the kite string and broke it off about three feet from the stake to which it was attached. His statement is not contradicted by any direct evidence.

The defendant as well as the plaintiff offered expert testimony in support of their theories.

Mr. W. G. Kelly, a graduate of the Massachusetts

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Institute of Technology, for the defendant, in response to a hypothetical question stated that when the radio wire touched the other wires the effect would be to burn the wires in two. He further stated:

"Before the radio wire is burned in two the current passes down this radio wire between the two wires. After a wire is burned in two between these two high tension wires, an arc is formed between these two high tension wires, created by the burning of that wire. The arc follows the line of the radio wire. Assuming this radio wire is a No. 22, and the high tension wire carries a voltage of 33,000 and an amperage of 25 to 30, there would be sufficient current and voltage passing on the radio wire to burn an individual who had hold of a kite wire on the ground. It would have sufficient power and energy to knock him down." "Your hands are in direct contact with the wire, while your feet are to a small extent separated from the ground, and the burning of the feet might be more than of the hands. That is due to the fact that the resistance from the feet to the ground is greater than the resistance from the hands to the wire. There is a flow of current between the feet and the ground, without an arc. The burning is not always due to an arc at that point."

He states that often people burn in several places, and that it is not possible to explain all the burns in an injury of that kind. The experts agree that the fusing of a wire of this kind would depend upon the amount of current or amperage which would flow through it; that the current depends upon the voltage, and also upon the resistance, either of which will vary the amperage. Raising the voltage raises the amperage, and lowering the resistance raises the amperage. Electricity travels at the rate of 299,000 miles a second.

Defendant's experts, in response to hypothetical questions, said that when the radio wire came in contact with the high tension wires, the current would travel at that speed and would move along the radio wire before the heat developed which would fuse the wire or burn it up. On the other hand, the experts for the plaintiff said that the passage of the current from a 33,000 volt wire to the radio wire would immediately turn the radio wire into a gas, and that it would be burned up entirely. "You could not measure the time required to volatilize that wire. The time required to volati-

...the effect would be to have the area in two. The latter

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message. Absolutely flawless of the tone of his, and also a

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like that wire would be so small, so infinitesimal, that it is beyond human comprehension." An expert for plaintiff stated:

"It would be highly improbable that that wire, under these conditions, could conduct sufficient energy for a sufficient space of time, to cause any such burns as you have described. In the first place, it would appear that the wire crossing the two 33,000 volt leads would be burned up in such a short space of time that it would be burned clear before sufficient energy could endure in contact with the person that you have mentioned long enough to cause the effect that you have stated."

The physical situation was such that it was, we think, quite improbable that the radio wire would first come in contact with the most northerly wire on the upper crossarm but more probably would have come in contact with the southerly wire.

A further doubt is cast upon the theory of defendant by the fact that the three wires parted and fell at about the same place and about thirty feet west of the place where defendant's witness says the radio wire came in contact with the transmission wires. The physical situation of the kite and the radio wire, the place where the kite was flying and the place where the wire was held or staked, also tend to show that if the radio wire touched defendant's line it would have probably been at least that distance from the place at which defendant's wires broke and fell. Assuming defendant's contention that contact of the radio wire was the cause of defendant's wires breaking, we find no plausible theory by which the fact that the break occurred more than thirty feet away from the point of contact can be explained. On the other hand, if we assume one of the transmission wires broke and fell as a result of inherent weakness, the condition which resulted seems altogether probable and reasonable as the result of the formation of arcs between the broken wire and the unbroken ones.

The defendant contends that it was physically im-

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see page 11 for more on the scientific background

It was found that the wire was not connected to the ground and was not connected to the ground and was not connected to the ground.

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• *Chlorophyll a*

—The following may be of help when the following is used:

possible for one of the broken wires while attached to the easterly pole to move across the street and strike the plaintiff at the place where he was standing. The wires were 120 feet in length between the poles, and the testimony tends to show that the point at which they broke was about fifteen feet east of the most westerly pole. This would leave a wire about 105 feet in length on the lower cross-arm of the easterly pole at a distance of about twenty-five to twenty-eight feet from the ground. A plot in evidence shows that the elevation of the street gradually increased from the apex east to a point opposite the place where plaintiff was injured. The ground on which he stood was elevated some distance above the street. We think it was not without the bounds of possibility that one of these wires might strike the plaintiff. The evidence shows without contradiction that when the employees of the defendant arrived the fallen wires were down in Liberty street on the north side of it. This, however, was some fifteen minutes after the accident. The current had been turned off and the wires were not "live" wires when these employees arrived.

We are not unmindful of the difficulties under which we have examined this record. The evidence of occurrence witnesses is in direct conflict. It is impossible to reconcile their testimony upon the theory that each set of witnesses were trying to tell the truth. As counsel in the case said, one or the other of the groups are not telling the truth. The jury saw these witnesses and had advantages in weighing their testimony which we do not enjoy. An experienced jurist presided at the trial. He showed interest and put pertinent and useful questions to the witnesses. He had an opportunity to observe candor or lack of candor of the witnesses. The verdict which the jury returned has been approved by him. This court is not justified in ordering a new trial simply because the jury returned a verdict which this court, sitting as jurors, would

possible for me to find a place where I could be
 held in my own house, but I have no money to do so.
 where he was standing. The man was in a dark
 the place, and the woman was in a dark
 they were not about fifteen feet apart of the
 this woman was a white woman, but I do not know
 how it was that she was in a position of
 twenty-five feet from the ground. A girl in
 the position of the other girl was in a
 in a position of the other girl was in a
 ground on which he was standing. The man
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 one of these girls was in a position of
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 "This" was the only girl in the
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not have returned, nor even because this court, sitting as trial judges, might have granted a new trial. We reverse and remand only where the verdict is manifestly against the weight of the evidence. Applying that rule to this record (with some hesitation) we hold a new trial should not be ordered.

The defendant also complains, in particular, of instruction No. 5, by which the court told the jury:

"The court instructs the jury that the plaintiff is not bound to prove his case beyond a reasonable doubt, but is only bound to prove it by a preponderance of the evidence. If the jury find that the evidence bearing upon the issues in this case preponderates in his favor, although but slightly, it would be sufficient to justify a finding of the issues in his favor."

This is a stock instruction which has been usually given when requested and is materially different from the instruction condemned in Lenning v. Lenning, 176 Ill. 180, cited by defendant, where the jury was instructed that in order to find defendant guilty, the charge should be "clearly established by a preponderance of all the evidence." An instruction substantially similar to No. 5 was approved by the Supreme Court in Banley v. Dougherty, 174 Ill. 587, and also in Taylor v. Felsing, 164 Ill. 331, upon the authority of Mitchell v. Winman, 150 Ill. 552. It has also been approved in Chicago City Ry. v. Brady, 210 Ill. 39, and in Hanchett v. Hagg, 219 Ill. 346.

Defendant cites and relies on Tater v. Spooner, 508 Ill. 198, which was a case where a will was contested on the ground of lack of mental capacity and undue influence. The court criticized certain instructions, saying that the use of the adjectives "slight" and "clear" with reference to the preponderance of the evidence required to sustain an issue, was only confusing to the jury and ought not to be used in instructions in any case; that no one knows what is a slight preponderance or what is a clear preponderance of the evidence, although everyone knows what is meant by a preponderance

and have returned, not even having this time, adding as they
 before, which have passed a new trial. The parties and counsel
 will have the verdict in writing and the value of the
 evidence. Applying that to this case (with some exceptions)
 we hold a new trial should not be ordered.

The defendant has admitted, in evidence, at in-

struction No. 2, by which the case is the same.

"The court instructs the jury that the plaintiff is not
 bound to prove the defendant's guilt, but is only
 bound to prove it by a preponderance of the evidence. If the
 jury find that the evidence bearing upon the issues in this case
 preponderates in his favor, although not affirmatively, it would be
 sufficient to justify a finding of the issues in his favor."

This is a clear instruction which does not require

any other explanation and is substantially identical with the instruction

also contained in Johnson v. Johnson, 100 Ill. 100, cited by the

court, where the jury was instructed that in order to find the

defendant guilty, the weight should be given to the evidence.

Preponderance of all the evidence. No instruction was given

similar to No. 2 was presented by the defense in Johnson v.

Johnson, 100 Ill. 100, and also in Johnson v. Johnson, 100 Ill.

100, upon the question of Johnson v. Johnson, 100 Ill. 100. It

has also been approved in Johnson v. Johnson, 100 Ill. 100.

and in Johnson v. Johnson, 100 Ill. 100.

The court also has relied on Johnson v. Johnson, 100

Ill. 100, which was a case where a bill was returned on the ground

of lack of moral turpitude and which instruction. The court further

contains instructions, which are not at all different from

and "clear" with reference to the preponderance of the evidence the

question for the jury to decide, was only submitted to the jury and ought

not to be used in instructions in any case; and as the court

in a similar preponderance of all is a clear preponderance of the

evidence, although evidence being what is meant by a preponderance

of the evidence; that a preponderance of the evidence is necessarily clear even though it is slight. We cannot construe this language as condemning an instruction which has been heretofore often expressly approved.

There is no reversible error in the record, and for the reasons indicated the judgment is affirmed.

AFFIRMED.

McSursly, J., concurs.

O'Connor, J., dissents: It is inconceivable to me that the unfortunate accident could have occurred without the kite wire.

of the witness that a representation of the evidence is necessary
about your friend is to admit. The witness cannot tell whether or
not the witness is a liar or not. The witness is not a liar.

approved.

There is no material error in the record, and for

the reasons indicated the judgment is affirmed.

affirmed.

affirmed, 11/1/1911.

affirmed, 11/1/1911. It is recommended that the witness
be allowed to testify. The witness is not a liar.

119 - 31727

JOHN BRUMMER,
Appellant,

vs.

ANNA E. MARTIN,
Appellee.APPEAL FROM MUNICIPAL COURT
OF CHICAGO.MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment for the defendant entered upon the finding of the court.

On March 27, 1925, the plaintiff, as the owner and assignee of nine promissory notes, under power therein given, confessed judgment against the defendant for the amount of \$1615.42. Upon petition of the defendant the judgment was opened with leave to defend, the petition standing as an affidavit of merits.

The notes sued on were secured by a chattel mortgage and were made to the order of A. J. Paters, by whom the notes were endorsed. The act of June 21, 1925, (see Smith-Barry's Ill. Rev. Statutes, sec. 26, p. 1351) provides that notes thus secured by a chattel mortgage shall be "subject to all defenses existing between the payee and the payor of said notes the same as if said notes were held by the payee therein named."

The notes here sued on were executed and delivered by the defendant to Paters, the assignor payee, on January 7, 1925, and the consideration for the same was the promise of the payee to thereafter make certain repairs on the premises of defendant according to the terms and conditions of certain written contracts executed and delivered.

On February 27, 1925, the defendant paid to Paters the first of the series of notes which, by its terms, would not mature until March 3, 1925. The evidence tends to show that defendant at

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not throughout a month. This is the end of the season for the birds.

the following are the findings of the investigation:

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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10-11-1964 To: Bureau - 1000 1st St. N.W. Washington, D.C. 20535

an action of the Government to the effect of the

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The notes and other material were removed by a certified notary.

and were made in the order of A. J. Baker, Jr. when the notes were

repeated. The end of June 1948, (see Vol. 1, p. 111, Nov.

Revised, 1964, by the

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The action was not taken on the basis of the information received by the FBI from the Bureau of the Census.

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Approved for release by NSA on 08-29-2013 pursuant to E.O. 13526

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1971 March 2, 1972. The following birds were seen on the island.

that time had no notice that the note in question had been assigned to the plaintiff. The note, however, was not produced and the defendant paid the same, taking the receipt of Patern.

The plaintiff testifies that he called on the defendant twice before this note was due and told her that he had purchased these notes from Patern. This is positively denied by the defendant. The plaintiff argues that the defendant is not corroborated and says that the burden of proof is on her and that it is not likely that a party holding notes for this amount would fail to notify the maker of his ownership. Whatever weight there may be to this suggestion is more than overcome by the reflection that it is most unlikely that the defendant would have paid the note to Patern had she received any such notice. The plaintiff cites cases, such as Ling v. Heilig and Rife, 203 Ill. App. 117, which state the well known rule applied in such cases to negotiable paper. However, the statute is controlling here, which says that these notes shall be subject to all defenses the same as if the notes were held by the payee. This language is too plain to be whittled away by judicial construction. There is no merit to this contention.

As to the other notes, the affidavit of merits alleged and the proof tended to show (as the court must have found) that shortly after the execution of the notes A. J. Patern abandoned his contracts, which were the consideration for the notes, and that defendant was obliged to make the repairs at her own expense and pay certain claims for labor and material in order to prevent liens from being filed against her property. Here again the plaintiff urges that the contracts had not been abandoned at the time when the notes were assigned to him, and that therefore defendant could not interpose this defense. Plaintiff cites to this point Whitaker v. Ginger, 204 Ill. App. 632, an abstracted decision, from an examination of which it is apparent this question was not raised nor at all necessary to

that time had no notice that the note in question had been assigned to the plaintiff. The note, however, was not produced and the law cannot give the same, leaving the receipt of interest.

The plaintiff testified that he called on the defendant

and told him that the note was not paid and that he had possession

of the note from the defendant. This is positively denied by the defendant.

The plaintiff argues that the defendant is not concerned and says

that the burden of proof is on her and that it is not likely that a

party holding notes for this amount would tell to nearly the maker

of his ownership. Whatever weight there may be to this suggestion

is more than overcome by the fact that it is not unlikely

that the defendant would have told the note to the maker and the re-

solved any such notice. The plaintiff also cannot, under the

Billie and Billie, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

applied in such cases to negotiable notes. However, the statute is

conflicting here, which says that those notes shall be subject to

all defenses and such as if the notes were held by the maker. This

language is too plain to be withheld away by judicial construction.

There is no merit to this contention.

As to the other matter, the plaintiff's evidence alleged

and the great burden is upon her to show that the defendant did

not pay the amount of the note at the time when the note was

contracted, which were the considerations for the note, and that the

defendant was obliged to make the payment of her own expense and pay

certain of the for labor and material in order to prevent loss from

being filed against her property. Here again the plaintiff argues

that the contract was not been executed at the time when the note

was assigned to him, and that therefore defendant could not introduce

this defense. This is also the point Whitaker v. Lister, 100

Ill. App. 372, an established principle, from an examination of which

it is apparent this question was not raised and it is necessary to

a decision of the case. The language of the statute here applicable is plain, and we hold that under its provisions the maker of a chattel mortgage note, when sued by an assignee, may interpose any defenses which could have been interposed if the payee owned and sued, whether the defense existed before or after the assignment of the note. This construction is required by the language of the statute and a contrary construction, for which plaintiff contends, would defeat the obvious purpose for which the statute was enacted.

The proof shows without contradiction that shortly after the notes were delivered to the payee he abandoned his contracts, which were the consideration for these notes, leaving material men and laborers unpaid, and after he had collected more than \$600 in cash from the defendant. The defendant undertook to complete the work which Paters had agreed to do, and the undisputed evidence shows that she paid therefor \$1579.32. The plaintiff urges that the proof fails to connect these expenditures with the completion of the contracts of Paters; that defendant failed to prove by competent evidence the delivery of certain materials purchased by her and failed to prove that certain material and labor were necessary for the completion of the contracts, and further that certain material and labor were supplied that were not provided for in the contract.

We have examined the evidence upon these issues of fact and think that, while the proof was in some respects slight it was prima facie sufficient. Moreover, plaintiff did not by any pleading take issue with defendant in these respects. The defense was not, as plaintiff seems to suppose, recoupment, but failure of consideration. The plaintiff, under the evidence and the pleadings, could not have recovered on the notes even if defendant had not attempted to complete the contracts at all. Plaintiff's contentions are with-

...of the notes. The language of the statute here applicable is in plain, and we hold that under the provisions the maker of a national mortgage note, when sued by an assignee, may introduce any evidence which would have been introduced if the notes were not sold, whether the balance existed before or after the assignment of the note. This construction is required by the language of the statute and a contrary construction, for which plaintiff contends, would defeat the obvious purpose for which the statute was enacted.

The great error without consideration that thereby effect the notes were delivered to the payee he abandoned his defense, which were the consideration for money notes, bearing interest and not interest any less, and after he had introduced more than \$500 in cash from the defendant. The defendant moved back to annul the note which before had agreed to do, and the defendant's evidence shows that he paid therefor \$100.00. The plaintiff argues that the great fallacy is to suppose that the defendant with the annulment of the contract of interest; that defendant failed to prove by competent evidence the delivery of certain notes to the defendant by her and failed to prove that certain payments and notes were necessary for the annulment of the contract, and further that certain material facts were omitted that were not provided for in the contract.

We have examined the evidence and found that it is not true that, while the great war in some respects aided it and others (with sufficient) however, plaintiff did not by any means take leave with defendant in these respects. The balance was not as plaintiff seems to suppose, respondent, but failure of construction. The plaintiff, under the evidence and the pleadings, could not have recovered on the notes even if defendant had not attempted to complete the mortgage at all. Plaintiff's contention was also

out merit and the judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

• 100% of income will be paid for

— JAMES M.

Journal of Management Education 31(10)

AMERICAN GLASS COMPANY,
a Corporation,

Appellee,

vs.

E. F. ACKERMAN,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by a judgment debtor from an order which denied his motion to quash an execution issued on the judgment and for the satisfaction of the same. The judgment was entered by confession June 23, 1925, and the motion was supported by an affidavit of the judgment debtor, Ackerman, which in substance averred that the note upon which the judgment was confessed was one given by him as accommodation for one John H. Bickley, who was then indebted to the plaintiff; that Bickley was to pay the note before maturity, which he failed and neglected to do, but thereafter executed new notes to the plaintiff which had been paid in full by said Bickley; that Bickley thereafter procured the plaintiff, American Glass Company, to execute an alleged assignment of the judgment and procured the execution to be issued.

Filkington, the alleged assignee of the judgment, answered averring on information and belief that the note upon which judgment was entered was not an accommodation note but was given for the indebtedness of Ackerman to the plaintiff, denied that Bickley paid the judgment as alleged and averred that he, Filkington, purchased the judgment in good faith through Bickley acting as agent, and paid a valuable consideration therefor. The petitioner and respondent offered evidence in support of their respective contentions, and the respondent seems to concede power of the court to

THE CHICAGO TRIBUNE
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This subject is by a judgment dated from an order which asked his action in regard to execution issued on one judgment and the satisfaction of the same. The judgment was entered by conclusion June 23, 1928, and the action was answered by an affidavit of the judgment debtor, unknown, which is returned averred that the note upon which the judgment was entered was one given by him as accommodation for one John H. Wiley, who was then indebted to the plaintiff; that Wiley was to pay the note before maturity, which he failed and defaulted to do, but thereafter entered new notes to the plaintiff which had been paid in full by said Wiley; that Wiley thereafter secured the maturity of the American Glass Company, so credits an alleged assignment of the judgment and proposed the execution to be issued.

Witness, the alleged assignee of the judgment, answered averring an intention and belief that the note upon which judgment was entered was not an accommodation note but was given for the indebtedness of someone to the plaintiff, and that Wiley held the judgment as assigned and agreed and agreed that he, Plaintiff, proposed the judgment be paid with interest Wiley being as plaintiff and paid a valuable consideration therefor. The plaintiff and

grant the motion in case the facts were as averred in the petition.

Although there is some conflict in the evidence, we think a clear preponderance indicates that the indebtedness for which the note was given was in fact the indebtedness of John M. Bickley, who was a building contractor and a former partner of Ackerman. We are strongly persuaded to this view because of the undisputed fact that after the judgment against Ackerman had been entered, Bickley gave to the Glass company his own notes for the indebtedness and, pursuant to a settlement made with the Glass company on June 14, 1926 paid the entire indebtedness to the Glass company. The denials that the note was given for his indebtedness has little weight in view of these uncontradicted facts. On the other hand, the uncontradicted fact that the Glass company executed an assignment of this judgment, which on August 4, 1926, was by their attorney delivered to the attorney for Bickley, seems quite inconsistent with the testimony of the attorney and officials for that company who say that Bickley acknowledged the indebtedness was his and made payments thereon. They further testify that Ackerman was not indebted to the Glass company in any way at the time the judgment note was executed. A letter from the attorney for the Glass company transmitting the assignment to Bickley's attorney is mentioned in the evidence but does not appear in the record.

Pilkington did not testify, and it requires some credulity to believe, as the evidence for respondent tends to show, that he paid \$1,000 in cash for a claim of this character. However, his pleading avers that Bickley acted as his agent in the matter and Bickley had full knowledge of the facts, which must therefore, we think, be imputed to Pilkington.

Further evidence may disclose what the actual rights of the parties are, but the order, as the present record stands, is, in our opinion, against the manifest weight of the evidence. For that reason it will be reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

10-11-1964

Although there were no collisions in the vicinity of the bridge, the bridge was damaged by the collision.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

THE UNIVERSITY OF CHICAGO

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NOTE: All work on project begins with the principal as at 10:00 AM

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Yours truly,
 J. Edgar Hoover

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the attorney for the above named person and I have been advised that the same person is now in the custody of the police and is being held in the city of New York.

Albany's attorney is confident in the trial and does not want

Keywords: child sexual abuse; disclosure; self-blame

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Journal of Management Education 26(7)

100-443887-100

LOWENTHAL SECURITIES COMPANY,
a Corporation,

Appellee,

vs.

WHITE PAVING COMPANY, a
Corporation,

Appellant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit and upon trial by the court without a jury, there was a finding and judgment for the plaintiff in the sum of \$16,285.27.

The suit was based upon a written agreement entered into on May 23, 1922, the material terms of which are as follows:

"May 23, 1922.

Lowenthal Securities Company,
208 S. LaSalle Street,
Chicago, Ill.

"We herewith agree to sell to you the City of Chicago Special Assessment Improvement Bonds and Vouchers bearing interest at the rate of five (5) per cent or six (6) per cent (excepting supplemental vouchers, endorsed vouchers, and retainer certificates) that have been issued by the City of Chicago in payment of work done or to be done by us on contracts awarded to us by the City of Chicago during the years 1921 and 1922, with the exception of an amount not in excess of three hundred thousand dollars (\$300,000) which we wish to dispose of or retain for ourselves.

"It is understood that all estimates in each installment of the various warrants will be delivered by us complete, including first installment vouchers."***

"It is further understood and agreed that as soon as the various vouchers or bonds are issued by the City of Chicago we are to deliver them to you, and you are to pay for the said bonds and vouchers as follows: On all bonds or vouchers bearing interest at the rate of five (5) per cent we are to deliver and you are to accept same at ninety-two (92) per cent of their face principal amount plus accrued interest. On all bonds or vouchers bearing interest at the rate of six (6) per cent we are to deliver and you are to accept same at ninety-five (95) per cent of their face principal amount plus accrued interest. It is further understood that, should the market price that you pay to any contractors for the nineteen twenty-two season be in excess of the above amounts we are to receive the benefit of said increase in price.

"It is further understood that on any of the bonds or vouchers delivered wherein work is completed prior to February 15, 1923, unless final adjudication is entered into on or before March 1, 1923 we will re-purchase from you. On any work completed after February 15, 1923, unless final adjudication is had on said work

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THE UNIVERSITY OF CHICAGO

...and the other two are ...

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THE NEW YORK PUBLIC LIBRARY

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• CFI, p. 1041C

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

10. The following information is being furnished to you for your information only. It is not to be used for any other purpose.

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before March 1, 1924, we will re-purchase from you***.

"We also agree to sell to you, and you agree to purchase from us the interest bearing vouchers and bonds that may be issued against supplemental assessments where we have heretofore sold to you and delivered the original paper, it being understood that you will receive and purchase from us the said supplemental paper upon the same terms and conditions that the original paper was purchased as soon as final adjudication has been entered by the court, and legal opinions furnished ***.

"It is understood that the entering into this contract shall effect a cancellation of all unperformed obligations imposed upon either of us by a certain contract dated September 30, 1921.

"The acceptance of this proposal constitutes a contract between us."

The declaration averred that after the making of this contract, namely, on July 11, 1922, the City of Chicago awarded to defendant a contract for the paving of a portion of Ogden avenue; that defendant did the work and the City delivered to it, during the years 1922 and 1923, five per cent vouchers to the amount of \$300,000, of which defendant retained \$300,000; that defendant refused and neglected to deliver to the plaintiff such bonds to the amount of \$43,760.53; that subsequent to July 11, 1922, the City of Chicago caused supplemental assessments to be levied for the purpose of paving Ogden avenue and issued supplemental vouchers against the same, and during the years 1922 and 1923 delivered the same to the defendant to the amount of \$200,000, but that defendant neglected and refused to deliver the same to the plaintiff, but retained \$125,000 of the same; that on August 8, 1922, the City awarded and the defendant accepted a contract to pave a portion of Kilbourne avenue, and that the city issued to the defendant a voucher thereon bearing interest at the rate of six per cent per annum for the sum of \$954.33, which defendant neglected and refused to deliver to plaintiff.

A second count substantially similar to the first was added, together with the common counts. Defendant filed a plea of the general issue.

The evidence tends to show that there were disputed vouchers as between the parties, amounting to the total sum of \$169,714.85; that the discount upon the same, according to the terms

of the contract, would amount to \$13,577.13. The court found damages to this amount and entered judgment for the same plus interest at the rate of five per cent per annum, amounting to the sum of \$2,703.59, making the total sum for which judgment was entered.

The principal contention of the defendant is that all the special assessment vouchers offered in evidence by the plaintiff were issued by the City of Chicago after May 23, 1922, and that the same did not therefore come within the terms of the contract between plaintiff and defendant which was executed upon said date. Defendant contends that this is the proper construction of the contract by reason of the fact that the selling clause contains the phrase, "that have been issued by the City of Chicago," and it is urged that the plain meaning of this is that the contract of the parties was limited in its operation to such vouchers as had been issued by the City of Chicago prior to May 23, 1922, which was the date of the contract. The primary object of construing a contract is to find the intention of the parties to it, and one of the elementary rules of such construction is that this intent must be found in the words of the contract and in all the words of the contract, rather than any part of it. This general rule is especially true of phrases in a contract referring to time. An inspection of the whole paragraph shows that the vouchers which are the subject matter of the contract are not only vouchers that had been issued by the City of Chicago at the date of the contract, but vouchers issued in payment of work "done or to be done by us on contracts awarded to us by the City of Chicago during the years 1921 and 1922."

If there were any doubt about this construction it would be removed by the further provision of the contract that "as soon as the various vouchers or bonds are issued by the City of Chicago we are to deliver them to you." The construction for which the defendant contends would require the interpolation of other words or phrases

of the contract, would amount to \$1,177.12. The same total amount
to this amount and interest judgment for the same period interest at the
rate of five per cent per annum, amounting to the sum of \$2,702.80,
making the total sum the above judgment was entered.

The stipulation of the defendant is that all in
stated amount should be entered in evidence by the plaintiff were
found by the jury at the time when the same were made.
All the stipulations were within the scope of the contract between
plaintiff and defendant which was entered into this date.

contracts that this is the proper construction of the contract by
reason of the fact that the selling clause contains the words, "shall
have been issued by the City of Chicago," and it is agreed that the
plain meaning of this is that the contract of the parties was limited
to the operation to such vendors as had been issued by the City of
Chicago prior to May 22, 1902, which was the date of the contract.

The primary object of entering a contract is to limit the operation
of the parties to it, and one of the elements of such a contract
is that the parties must be found in the words of the con-
tract and in all the words of the contract, rather than any part of
it. This general rule is especially true of contracts in a contract
relating to time. As indicated by the words "shall have been issued
the vendors which are the subject matter of the contract was not
only vendors that had been issued by the City of Chicago at the date
of the contract, but vendors issued in payment of work done on or in
front of the contract is as in the City of Chicago.

The contract was not made.
It should be noted that the contract was not made.

be entered by the defendant provision of the contract that "as soon as
the various vendors or bonds are issued by the City of Chicago we
are to deliver them to you." The construction of these words of promise
and contracts would require the interpretation of other words of promise

which would be opposed to the intention as disclosed by the entire agreement and would render the other portions of the contract entirely meaningless. Further, defendant, by its own acts at various times, and with practical uniformity in its dealing with the plaintiff under the contract, acquiesced in a construction of the contract contrary to that for which it now contends. To this the defendant replies that, if the contract is to be considered as ambiguous, the ambiguity is patent and the contract therefore would not be enforceable and plaintiff could not recover thereon. Rees v. Johnson, 191 Ill. App. 183, and Mercantile Ins. Co. v. Jaynes, 87 Ill. 199, are cited to this point; but an examination of the cases discloses them as easily distinguishable. We do not think this contract considered as a whole is ambiguous nor the intention of the parties to it in doubt, but if it is, the ambiguity is not patent, and the uniform construction of the parties was admissible in evidence for the purpose of ascertaining the intention.

The defendant next contends that as all but \$8,000 of the Ogden avenue vouchers were "supplemental vouchers," - that is, vouchers issued against supplemental assessments levied - the same are excluded from the terms of the contract by the provision "We also agree to sell to you and you agree to purchase from us the interest bearing vouchers and bonds that may be issued against supplemental assessments where we have heretofore sold to you and delivered the original paper." The defendant argues that, as the Ogden avenue improvement was initiated after the execution of this contract on May 23, 1922, and as the City awarded the contract for this improvement to defendant July 11, 1922, it is clear that defendant had not "heretofore" - that is, prior to May 23, 1922 - sold any original paper on the Ogden avenue improvement to the plaintiff; that defendant was therefore not obligated to deliver any Ogden avenue supplemental vouchers to the plaintiff, and that the court

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was not warranted in awarding damages for anything but the \$9,000, which was not supplemental. Defendant appeals to the dictionary as to the meaning of "heretofore," but even the dictionary must give way to the plain intention of the parties as expressed in the whole contract. As to the first paragraph of the contract, defendant relies upon a single phrase. It would make the construction of this paragraph depend on the use of a single word.

The evidence shows that the installments under which supplementals were issued came under the same warrant number under which the original papers were issued; that the two or three quarter million dollars worth of vouchers sold to plaintiff after May 26, 1922, included supplemental as well as original paper, and indeed the uniform course of conduct of the parties shows that the word was not used in the sense for which the defendant now contends. Under such circumstances courts have repeatedly held the word "heretofore" to be the equivalent of the word "theretofore."

Skookum Oil Co. v. Thomas, 123 Pac. 363; Whipple v. Judge of Saginaw Circuit, 26 Mich. 341; Perrine v. Farr, 22 N. J. L. 356; Pancop v. Troth et al., 34 N. J. L. 377.)

The defendant next contends that, if the contract is to be given a liberal construction, vouchers to the amount of \$95,000 bearing date November 25, 1922, which were paid by the City on December 1, 1922, should be excluded for the reason, as it says, that these vouchers were in substance cash vouchers and therefore should be considered as cash and not as interest bearing securities. It says that, as a matter of fact, the money received upon this issue of bonds was in the treasury of the City on November 25, 1922, the day upon which the vouchers bear date, and was available for the payment of these bonds; that it was transferred to the special assessment fund on December 1, 1922, and checks were issued against it on the vouchers the same day and delivered to the defendant on the following day, namely, December 2, 1922. Defendant says that

was not intended to be used in connection with the 1934-1935
year and not subsequently. Defendant wishes to be distinctly
to the meaning of "interceptor," but even the dictionary must give
way to the plain intention of the parties as expressed in the whole
context. As to the first paragraph of the contract, defendant re-
fers to a single phrase. It would make the connection of this
paragraph based on the use of a single word.

The evidence shows that the installment notes which
were made were issued under the name of the number under
which the original papers were issued; that the two or three papers
issued with the worth of vouchers said to be identical after May 15,
1935, included defendant as well as original paper, and indeed
the nature of conduct of the parties shows that the word
was not used in the sense for which the defendant now contends.
What was a reference could have reasonably held the word
"interceptor" to be the equivalent of the word "interceptor."

Exhibit 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The defendant now contends that, if the contract is to
be given a liberal construction, vouchers in the amount of \$25,000
bearing date November 25, 1934, which were sold by the City on the
number 1, 1935, should be excluded for the reason, as is said, that
these vouchers were in substance cash vouchers and therefore should
be considered as cash and not as interest bearing securities. It
says that, as a matter of fact, the money received upon this issue
of bonds was in the treasury of the City on November 25, 1934, the
day upon which the vouchers were sold, and was available for the
payment of these bonds; that it was transferred to the special
account fund on December 1, 1934, and vouchers were issued against
it on the vouchers the same day and delivered to the defendant on
the following day, namely, December 2, 1934. Defendant now says

these vouchers were therefore not within the spirit of the contract; that it must be evident that the defendant was intending to dispose of paper that would have to be carried, not paper which could be immediately cashed. All the other vouchers, defendant points out, would not mature until within eight months to three years after their date.

We are not impressed with this contention. While, under the law the City could have paid these obligations in cash had it desired so to do, it apparently did not, but on the contrary issued the interest bearing vouchers, which clearly come within the description of securities which, under the terms of the contract, the defendant was obligated to deliver. We have no power to make a new contract for the parties.

It is also urged that the court erred in including interest in its finding. In Laughlin v. Hopkinson, 202 Ill. 86, the Supreme court stated the better rule to be that interest would be allowed when the demand was of such a nature that its exact pecuniary amount could be ascertained by computation, and when the time from which interest was allowed to run could be ascertained. Within that rule, we think the court did not err in allowing interest.

The judgment is just and is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

their views are more therefore not within the spirit of the contract;
that it was to be held that the defendant was entitled to be
of power and would have to be carried, not paper which could be
immediately cashed. All the other powers, including points out
would not mature until within eight months in three years after
their date.

We are not concerned with this connection. While
under the law the City could have paid these obligations in cash
but it decided to do so, it apparently did not, on the contrary
it used the interest bearing treasury, which obviously was within the
authority of the committee which was the basis of the contract.
The defendant was entitled to deliver. It was so stated in the
new contract in the contract.

It is also noted that the contract was to be
delivered in the future. In Smith v. Smith, 100 Ill. 40,
the Supreme Court stated the same rule to be that interest would
be allowed when the amount was of such a nature that the contract
generally would be accounted for by cash, and when the
time then when interest was allowed to run could be ascertained.
Within these rules, we think the court did not err in allowing the
interest.

The judgment is just and is affirmed.
AFFIRMED.
O'Connor and Kennedy, JJ., concur.

ALEXANDER & TUCKER REALTY
COMPANY, a Corporation,
Appellee,

vs.

EMMA AUER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover a real estate broker's commission and upon trial by the court had judgment for \$1800, from which the defendant appeals.

In the early part of 1926 defendant was the owner of the premises at 4711-4715 Michigan avenue, Chicago, which was subsequently sold to Thomas Brazelton. Plaintiff claims a commission on this sale, averring that Edward Johnson, a salesman in its employ, was the procuring cause. Defendant denies that Johnson had anything to do with the sale, which she says was brought about through other means.

It is too well established to require citations that a broker is entitled to recover commissions in a suit only when he shows by a preponderance of the evidence that he was the procuring cause of the sale.

At different times during March, 1926, some ten or twelve brokers called on defendant to inquire if the property in question was for sale, and among them was Edward Johnson, plaintiff's salesman. Defendant told him that she would take \$70,000 for it; Johnson told her he thought he could get about \$50,000. This angered defendant, who thereupon ordered him to leave the building and not to come back. Johnson does not deny this; he says that sometime during the month of March defendant's son, Mr. Waddell, listed the property with his firm for sale.

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This is categorically denied by Waddell, who testified that he never listed the property with Johnson or with the plaintiff company and never employed either of them to sell it. Johnson testified that he had a telephone conversation with Waddell with reference to the building and that he wrote on a card what Waddell is alleged to have said, which card was introduced in evidence. Waddell denies positively that he ever had any conversation with Johnson over the telephone concerning the property; he says he was in plaintiff's office in March with reference to some business connected with one of defendant's tenants but not with reference to the building on Michigan avenue.

Both Waddell and the defendant testified that through their janitor they learned that a Mrs. Smith might be interested in the property and that Waddell went to her home and had negotiations with her looking to a sale. Mrs. Smith was unable to raise enough money to buy the property and so informed Waddell, but also informed him that her brother, Thomas Brazelton, and Mrs. Brazelton might be interested in its purchase. Pursuant to arrangements, Waddell on April 21, 1926, called at the home of Mrs. Smith where he met Mrs. Brazelton and submitted the property to her. There was a discussion concerning it and an appointment was made with Mrs. Brazelton to examine the property on the morning of Saturday, April 24th. They met at that time and Mrs. Brazelton and Waddell went through the premises. Johnson was not present at this time. Waddell made an appointment for the parties to meet at Mrs. Smith's home on the afternoon of the same day, April 24th. At this second meeting of that day were present Mrs. Smith, Mrs. Brazelton, Waddell and the defendant. At this meeting Johnson for the first time appeared. It is established by the testimony of all the witnesses except Johnson that he took no part in the discussion relative to the sale of the building and did nothing except sit in the room; as Mrs. Brazelton described it, he (Johnson) "just out there like a bump

THE BELLEVILLE FREE PRESS, PUBLISHED WEEKLY, AT THE BELLEVILLE FREE PRESS OFFICE, 100 N. 3RD ST., BELLEVILLE, ILL., MONDAY, JANUARY 12, 1903.

The following is a list of the names of the persons who have been appointed to the various committees of the National Council on the Arts and the National Council on the Humanities, as recommended by the National Commission on the Arts and the National Commission on the Humanities, in their report to the President, dated June 1, 1965.

on a log." Both Mr. and Mrs. Brazelton testified positively that neither of them had any conversation with Johnson relative to the purchase of the property and that he never submitted it to them. Both testified that they first learned of the property through Mrs. Smith and that Johnson had nothing whatever to do with it.

Johnson testified that he submitted the property over the telephone to Mrs. Brazelton when she called in answer to an advertisement which he ran in a paper. Subsequently he admitted that the date of the paper in which the advertisement appeared was April 24th, which was three days after Waddell had discussed the property with Mrs. Brazelton and the same day that they examined the property together. Johnson's testimony is further discredited by the fact that he at one time testified to having had in his possession an itemized statement of the rental of the property, but subsequently he claimed either to have destroyed or lost it. As such a statement would tend to support his testimony that Waddell had listed the property with him, the non-production of the alleged statement is significant. A further item of evidence casting doubt on the plaintiff's version is that on April 29th, which was five days after Waddell and Mrs. Brazelton had examined the property and eight days after they had discussed the same, plaintiff wrote defendant a letter saying, in part, "We have today submitted your property at 4711-15 Michigan avenue to Mr. and Mrs. T. Brazelton."

There are other facts and circumstances which lead irresistibly to the conclusion that the purchasers first learned of the property through their sister and sister-in-law, Mrs. Smith, and that defendant's son, Waddell, was the active party in negotiating and effectuating the sale, and that Edward Johnson, plaintiff's salesman, had no causal connection therewith.

There were errors upon the trial which would necessitate a reversal, but as the trial was by the court we may reverse

with the fact that the same person was not in the same place at the same time. The fact that the same person was not in the same place at the same time is a fact that is not in dispute. The fact that the same person was not in the same place at the same time is a fact that is not in dispute.

These estimates will be obtained as follows:

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1. *Journal of the American Medical Association*, 1997; 277: 1039-1043.

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THE UNIVERSITY OF CHICAGO PRESS

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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without remanding. We hold that the finding of the court was manifestly against the weight of the evidence and that the clear preponderance of the evidence negatives plaintiff's claim. The judgment will therefore be reversed with a judgment of nil sciat in this court.

REVERSED WITH JUDGMENT OF NIL SCIAT.

Wachett, P. J., and O'Donner, J., concur.

87 - 31698

EUGENE A. BOURNIQUE,
Appellee.

vs.

JOHN B. DRAKE,
Appellant.APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

In November, 1910, plaintiff commenced this suit, claiming a real estate broker's commission for effecting a sale of real estate located at the southeast corner of Washington street and Wabash avenue in Chicago, while acting as the authorized agent of the defendant. Four trials have followed; the last resulted in a verdict for plaintiff for \$27,500, and from the judgment thereon defendant appeals.

All the trials have resulted in verdicts for plaintiff (one for one dollar and two for \$27,500 each) except one which was for the defendant under a peremptory instruction by the court. The first judgment for \$27,500 was reversed by the Appellate Court and the cause remanded. 195 Ill. App., 12, opinion by Mr. Justice Barnes. The judgment on the instructed verdict was reversed and the cause remanded by this court. 236 Ill. App. 78, opinion by Mr. Justice Johnston.

We hold that the present judgment should be affirmed. The transactions between the parties appear rather fully in the prior opinions; we shall not repeat much of what is there said, thus leaving little to be narrated in this opinion.

Was plaintiff the authorized agent of defendant? Upon a former appeal (195 Ill. App. 12) this court said, in substance, that there was conflicting evidence on this point and, as the jury's finding depended largely on its view of the credibility of the witnesses, the verdict in that respect would not be dis-

turbed. The evidence upon the last trial was substantially the same as that considered upon the first appeal. It has been held that under such circumstances the rulings of the court of review upon a prior trial become the law of the case upon a subsequent review. City of Chicago v. Lord, 279 Ill. 167; Belakis v. Bering Coal Co., 246 Ill. 62; Lusk v. City of Chicago, 311 Ill. 183.

Even if this rule were not applicable, the instant record justified the finding that plaintiff was employed by defendant. November 5, 1906, plaintiff sent a letter to Mr. Chauncey Keep, one of the trustees of the Marshall Field estate, which purchased the property. A copy of this letter was sent to Mr. Drake or he saw the original before it was mailed, and he made no dissent from any statement made therein. The letter was in answer to some question raised by Mr. Keep with reference to the authority of Bournique to represent Drake; it summarizes the conversations and dealings between them and which are in evidence, showing Bournique's authority as Drake's agent. It repeatedly states that Bournique is acting in the matter under the authority of Drake, with the right to offer the property to any prospective purchaser except Mr. John G. Shedd, with whom, apparently, Drake had been dealing directly. Also significant is the letter to Bournique from Drake dated July 15, 1910, in which Drake purports to inform him of the sale of the property to the Field estate and expresses regret that he did not earn his commission by obtaining from the purchaser "our price." In the light of all that had taken place, these letters confirm Bournique's authority from Drake.

Was Bournique the procuring cause of the sale? Upon the first appeal this court was of the opinion that more testimony on this point might be had with special reference to whether the interviews with Bournique and his associate, Mr. Birch, induced the trustees to consider the purchase. Upon this last trial, in addition to the testimony heard upon the first, was the testimony of

a Mr. Stever, and of Mr. Orson Smith who was then the president of the Merchants Loan & Trust Company, one of the trustees of the Field estate. The other trustees were Chauncey Keap and Arthur B. Jones. Mr. Smith says that Mr. Birch approached him several times on the subject of this purchase and that he promised that he would take the matter up with the other trustees, and did so promptly. Shortly thereafter the trustees met again and decided to try to purchase the property. Mr. Hulbert, then the vice-president of the Merchants Loan & Trust Company, approached Drake directly. It is a reasonable inference that the meeting of Hulbert and Drake was pursuant to this discussion by the trustees after Mr. Smith's presentation of the matter in accordance with his promise to Mr. Birch. Mr. Hulbert would hardly take up the matter on his own responsibility; it is more credible that he saw Drake after and pursuant to the conference of the trustees; the interview of Birch with Smith produced the discussion by all the trustees, whose minds, made pliable by Bouranique's persistent persuasion, were easily turned to a favorable conclusion by this last presentation.

Both Bouranique and his associate Birch knew somewhat intimately most of the trustees of the Field estate. Their efforts towards interesting them in the purchase extended over a period of one and a half years and were constant. That these efforts were the procuring cause is not refuted by the fact that Hulbert, with whom the plaintiff had not discussed the matter, approached Drake directly. Hulbert was simply delegated to further the conclusion of the trustees, to which they were moved by the efforts of Bouranique. The jury was justified in finding that plaintiff was the procuring cause.

The verdict was based upon two and a half per cent of the price at which the property was sold, and defendant contends that there was not sufficient evidence to establish a custom in

A. H. HENRY, and at 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The writer has been told that a full year will be
 the time in which the property will be sold, and that the
 full value of the property will be realized.

this respect. It does not appear that plaintiff sought to establish a custom, but did seek to show, by the testimony of a witness of some thirty-seven years experience in the real estate business in Chicago, the reasonable value of the services of plaintiff. There was no testimony introduced tending to contradict this witness. There is point in the suggestion of plaintiff's counsel that it is too late to raise this question for the first time upon this appeal, where the testimony was virtually the same as on the first trial. Cases tending to support the correctness of the amount of the verdict are Regalin v. Lathgren, 207 Ill. App. 409; Furgett v. Weinrank, 219 Ill. App. 28.

We find no prejudicial error with reference to the giving or refusal of instructions. Neither was the conduct of the plaintiff's counsel so prejudicial as to require a reversal. The questions of which complaint is made were intended to develop whether there was any understanding between the trustees of the Field estate and Drake to indemnify him against the payment of a commission. Two of the trustees and Mr. Mulbert had testified on the trial on behalf of defendant. There was no impropriety in developing their interest, if any, in the result of the litigation.

Originally the suit ran against John B. Drake and Tracy Drake. During the first trial in 1914, on motion of plaintiff's attorney it was ordered that the papers and proceedings in the cause be amended by discontinuing as to Tracy Drake. Complaint is now made for the first time, after thirteen years, that the declaration had not, in fact, been amended. The point is without merit for the reason, first, it is made too late; and, second, the order did not give plaintiff leave to amend, but ordered that all papers and proceedings "be and are hereby amended by discontinuing" as to Tracy Drake. The effect of this was to strike his name out of the declaration. Boynston v. Alwert, 157 Ill. App. 227; Burns v.

Chicago Railway Co., 208 Ill. App. 295.

This case has been in the courts for over seventeen years. Four trials should be sufficient where only questions of fact are involved. Under such circumstances slight errors upon the trial are not sufficient to require a reversal.

Upon the facts plaintiff is entitled to recover, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

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A. H. WOODS THEATRE,
a Corporation, Appellant,

vs.

NORTH AMERICAN UNION,
a Corporation, Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE ROBINSON DELIVERED THE OPINION OF THE COURT.

This is a companion case to No. 31716, in which we have this day filed an opinion. In the instant case the judgment was for the month of August, 1926, amounting to \$310.33. This was tried at the same time as the other case and they were consolidated in this court for hearing.

For the reasons indicated in the opinion in No. 31716, the present judgment is reversed and the original judgment is confirmed.

REVERSED WITH A FINDING OF FACT.

Witchett, P. J., and O'Connor, J., concur.

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THE NATIONAL BUREAU OF INVESTIGATION

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FINDING OF FACT.

We find as a fact that the lesser, the plaintiff herein, committed no acts with reference to the occupancy of the premises leased to the defendant which amounted to a constructive eviction and justified the defendant in vacating the same.

The first of the two parts of the book is devoted to a general survey of the history of the book trade in the United States. The second part is devoted to a detailed study of the book trade in the city of New York. The book is written in a clear and concise style, and is well illustrated with numerous examples of book covers and titles. It is a valuable contribution to the history of the book trade in the United States.

THE NEW YORK PUBLIC LIBRARY

HOWARD PUTNAM STURGES et al.,

vs.

EDITH STURGES HELLER et al.

IN THE MATTER OF THE INTERVENING
PETITION OF JACOB A. ALBERT, MAX
BERNSTEIN and DAVID RUSSAKOV.

JACOB A. ALBERT et al.,
Intervening Petitioners,
Appellees,

vs.

GRACE D. STURGES et al.,
Respondents,
Appellants.

CROSS-APPEAL FROM DECREE
ENTERED BY JUDGE IRA RYAN
IN THE CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE McMERELY DELIVERED THE OPINION OF THE COURT.

This appeal questions the order of the chancellor awarding to the intervening petitioners approximately \$60,000, realized from a partition sale of real estate in which six adult heirs of Charles E. Sturges, deceased, each had a one-seventh interest, the other one-seventh being vested in minors. Two of these six adults answered, conceding the claim of petitioners, thus leaving four contesting.

By decree the chancellor found against three of these adults, namely, Edward Spencer Sturges, Howard Putnam Sturges and Grace D. Sturges, and found against the petitioners as to Caroline Margaret Sturges Hall on the ground of alleged insufficiency of the authority of the purported agent of Mrs. Hall. The first three Sturges heirs have appealed to this court, which appeal has been docketed under the general number 31814. The petitioners have appealed from that part of the decree touching Mrs. Hall and also have raised a question concerning the disposition of certain interest, which appeal has been docketed in this court under gen-

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eral number 31816. The appeals have been consolidated here for hearing.

We are of the opinion that the chancellor properly found against Edward Spencer Sturges, Howard Putnam Sturges and Mrs. Grace D. Sturges.

The fundamental question involved is the construction of a contract entered into January 16, 1923, between the petitioners, Jacob A. Albert and Max Bernstein, described therein as "purchasers," and the Sturges heirs, described therein as "sellers." By this contract the sellers agreed -

"to severally sell to said Albert and Bernstein an undivided one-seventh interest in the premises *** for a purchase price for each of said undivided interests of \$14,300 one-half in cash on consummation of the deal, and one-half in the notes of said Albert and Bernstein secured as hereinafter set forth,"

and further:

"to proceed as promptly as they reasonably can with the suit for a partition of said premises, now pending in the Circuit court of Cook county, Illinois, and the said purchasers agree to bid for said property One Hundred Thousand One Hundred Dollars (\$100,100) at said sale and hereby irrevocably constitute and appoint John M. Pollock as their Attorney in fact, for them and in their name, place and stead to bid said sum at said partition sale, with full power of substitution and revocation, hereby ratifying and confirming all that their said attorney in fact may do in the premises, but shall not thereby be excluded from themselves bidding the said or any greater sum at said sale, and it is further agreed that if said property shall sell at said partition sale for more than One Hundred Thousand One Hundred (\$100,100) dollars, that six-sevenths of the excess price shall be the property of the said Albert and Bernstein, the only object of proceeding with the partition suit being that they may legally acquire the one-seventh interest in said property belonging to Charles Fite, George Fite, Mary Fite and Frank Fite, minors; and the decree of sale shall provide for the term of sale to be one-half cash and the balance on or before a year, secured as hereinafter set forth."

January 23, 1923, Albert and Bernstein assigned their interest in this contract to David Kusanov, one of the petitioners.

The decree in the partition suit referred to was entered February 3, 1923, and provided, among other things, that the property be sold at public auction to the highest and best bidder for cash, or one-half cash and one-half on deferred payments to be

only number 2111. The records have been furnished here for

reference.

It was at the office of the Honorable Attorney General that the records were located, and the records were located at the office of the Honorable Attorney General.

Very truly yours,

The Honorable Attorney General is the author of the records at a distance of 100 miles, and the records are located at the office of the Honorable Attorney General. The records are located at the office of the Honorable Attorney General, and the records are located at the office of the Honorable Attorney General.

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evidenced by notes bearing interest at seven per cent per annum, secured by purchase money trust deed. On February 24, 1922, the partition sale took place and in accordance with the terms of the contract Mr. Pollock bid \$100,100 on behalf of the petitioners. There was another bidder at the sale, J. Raymond Collins, and a contest in bidding developed between him and Russakov, the assignee of Albert and Bernstein, in which Collins finally bid the property in for \$205,000, at which price it was sold to him. The sale therefore produced \$104,900 more than the \$100,100 which Albert and Bernstein had contracted to bid, and this excess is the subject matter of this controversy.

The petitioners say that the heirs are entitled to divide \$100,200 only, and that by the contract the excess, except as to the miners, belongs to petitioners. The four Sturges heirs contest this and claim it for themselves, asserting that a proper construction of the contract gives the petitioners the excess only in the event of their success in purchasing the property at the partition sale and not any excess arising through a sale to any other party.

The clause in question reads, "if said property shall sell at said partition sale for more than One Hundred Thousand One Hundred (\$100,100) dollars, that six-sevenths of the excess price shall be the property of the said Albert and Bernstein." The words "the excess price" obviously mean any excess from any source. If the heirs had wished to limit the excess, as they now contend, it would have been a very simple matter to have inserted after the clause the words, "provided they are the successful bidders." No such limiting words are in the contract. Giving the words their simplest and clearest meaning leaves no doubt that it was the intention of the parties, unambiguously expressed, that any excess over \$100,100 produced by the sale should be the

property of Albert and Bernstein. This provision is meaningless if it does not apply to a bid from others, for, if there should be no other bidders there would be no excess.

Another clause immediately preceding this, is that the proposed purchasers "shall not thereby be excluded from themselves bidding the said or any greater sum at said sale." This was in anticipation of other bidders who might bid in excess of the amount they agreed to bid, and it was reasonable, therefore, to provide that "the excess price shall be the property of" Albert and Bernstein.

The words "the excess price shall be the property of" Albert and Bernstein aptly express the idea of including any excess in price paid by an outside bidder. It savors of tautology to say that the excess of the purchasers' bid over the amount they agreed to pay and the heirs to accept should be their property. If this were the idea, it would be expressed by the words, "the excess shall be rebated" to Albert and Bernstein. This is not the language used.

There is nothing in any other provision of the contract inconsistent with this conclusion. The contract contains other clauses regarding the terms of the proposed purchase by Albert and Bernstein and the manner of carrying out the same. They are the usual provisions with reference to abstracts, trust deed and the terms of a sale. Such provisions manifestly were to operate only in the event that Albert and Bernstein secured the real estate at the sale. If they did not, these other provisions were inoperative.

There is nothing which amounts to a modification of the provision in question. The contract was drawn for the benefit of the purchasers and the adult heirs. With a one-seventh interest in the minors it was considered expedient to proceed with the partition suit, and so the contract provides that "the only object

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of proceeding with the partition suit being that they (Albert and Bernstein) may legally acquire the one-seventh interest in said property belonging to the minors. If there had been no minors' interest it is reasonable to assume that the sale would have been made outright for the price named, and Albert and Bernstein could have immediately resold the property to Collins or anyone else at the large advance and pocketed the profit without anyone questioning the transaction. The Sturges heirs agreed to accept \$100,000, the amount at which they were willing to sell the realty. Albert and Bernstein agreed that the heirs should receive that amount, and the purchasers took the chance of either losing or making on the deal. They were entitled to any profit arising from either a public or private sale. The contract clearly expressed the reasonable and fair thought of all the parties concerned. There is no ambiguity, and the chancellor correctly construed the contract.

Respective counsel have presented and argued extensively conversations and letters both before and after this transaction. As in our view the contract was unambiguous, it needed no extrinsic evidence to explain anything in it, and we rest our judgment upon this conclusion.

However, we have given careful attention to the extensive evidence presented concerning the circumstances surrounding the transaction and are of the opinion that, even if it might be conceded that there were any ambiguity in the contract, which it is not, the extraneous evidence clearly establishes the fact that it was the intention of the parties that Albert and Bernstein should be entitled to any excess produced by the sale from any source whatever. It would unduly extend this opinion to detail the evidence leading to this conclusion. There is ample in the record showing that the right to the excess was not questioned until after the sale, when its large amount inspired an intensive microscopic examination of the contract to discover if in some way its terms

might be avoided.

Grace B. Sturges, one of the contesting heirs, was represented by the firm of Scott, Baneroff, Martin & Macleish and more particularly by Mr. Scott. The contract in question was signed on her behalf by these attorneys, who also signed for the other two Sturges heirs who have conceded the petitioners' claim. Grace B. Sturges now denies that these attorneys had authority to sign her name to the contract. The master and the trial court both found that Mr. Scott's firm had such authority. We hold that the record shows such authority and also that by a memorandum in writing executed after the contract was signed Mrs. Sturges ratified the execution of the contract. It is well settled that while an agent's authority to enter into a contract for the sale of real estate must be in writing, it does not require any particular form to satisfy the Statute of Frauds. Any kind of writing from which the intention of the party to be charged may be gathered is sufficient. Wood v. Davis, 82 Ill. 311; Stein v. McKinney, 313 Ill. 84; Johnston v. Massinger, 226 Ill. App. 397.

The record shows that Mr. Scott's firm wrote to Mrs. Sturges as early as October, 1922, with reference to the sale of the real estate in question, submitting an offer of \$55,000. Mrs. Sturges replied to the effect that she was ready to accept Mr. Scott's advice and consent with the other heirs. Subsequently Mr. Scott wired her that they had an offer of \$85,000, to which she wired agreeing to accept the same. Thereafter a contract for the sale at this price was forwarded for her signature. Subsequently a wire was sent her reporting an offer of \$100,000 and advising that, while she was not legally bound to accept the \$85,000 bid, yet she was advised that "morally" she was. To this Mrs. Sturges replied that she agreed with Mr. Scott and that the price of \$85,000 should stand and that she would continue to rely upon his advice. There was other correspondence in which Mrs. Sturges advised Mr.

which he wished.

When it began, one of the attending ladies, who

represented by the list of guests, thought it desirable

and some satisfaction to Mr. Smith. The committee in general was

almost in her hands by some accident, and she almost for the

first time thought that she had succeeded in her purpose, and

found it, however, that these attempts had actually no

effect but were in the nature of the matter, and the ladies were

very much that Mr. Smith's plan had been successful. He said that

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Scott to see his judgment in the deal. Subsequently she was advised that the original bidders had raised the price to \$180,100, to which she replied that she would continue to be guided by her attorneys and that she would "rely" upon them. Subsequently Mr. Scott wrote her a long letter stating the entire transaction, which she acknowledged by letter, saying, among other things, "I might have a letter framed, seal affixed motto 'this office speaks for me,' because I have tried to unalterably convey this wish to your office." Subsequent letters asserted that she "had taken for granted you knew it was a settled matter in my mind," and that her thought of the matter was as if "all was signed and sealed and delivered." Mr. Scott's firm was also requested to take the cash received from the sale of this property and apply the same on her indebtedness to the firm. Other similar correspondence ensued. After the sale the firm informed her by letter of April 7, 1923, that Edward and Howard Sturges claimed that the heirs were entitled to the excess, which contentions Mr. Scott said, "are not honest or sound in law, and litigation over the question would be unavailing and would only result in long delay and great expense." Another letter to the same effect was written April 11th, reiterating his view of the contract and stating that however Howard and Edward Sturges "may now construe the contract, their understanding of it at the time it was made and until after the sale left to them and to the other adult heirs no interest whatever in any excess over the amount named in the contract." Another letter was written by Mr. Scott to Mrs. Sturges under date of April 13, 1923, reporting that Maynard Edith (two of the Sturges heirs) had instructed him to go to court and admit all the allegations of the petition, and Mr. Scott repeated his version of the facts as to what the parties intended and giving his opinion of the construction of the contract. Mrs. Sturges evidently had changed her mind,

for to this she replied by telegram dated April 18th, commencing: "When I signed contract with Albert and Bernstein I did not intend they should receive any excess profits."

Mr. Scott's firm, in the light of this correspondence, had full authority to sign Grace B. Sturges' name to the contract. Her repeated statements that she would rely on its judgment and that she considered the matter closed and that the proceeds from the sale should be applied on her indebtedness to the firm, prove the authority of her agents. Furthermore, her telegram after the transaction was a ratification of the authority of her attorneys to sign her name. Although she was at that time disposed not to accept her attorneys' advice as to the construction of the contract, she does not deny the making of it. Her position is simply that of the same as the other contesting heirs who admit the authority of their agent but dispute the effect of the contract. As said in Mayer v. Hirsch, Stein & Co., 212 Ill. App. 441:

"An oral contract may be taken out of the statute by a letter in which the party to be charged admits the making of the contract but, in terms, cancels it, or in which the writer seeks to deny or repudiate his liability under it."

The chancellor properly found that the contract was signed by Grace B. Sturges by her attorneys under proper authority in writing, which execution she subsequently confirmed in writing.

The chancellor was of the opinion that the evidence did not show that John M. Pollock had sufficient authority to sign the name of Caroline Margaret Sturges Hall to the contract. There is absent from the record any conclusive writing from Mrs. Hall to Mr. Pollock. There is evidence that he represented her and that he reported to her the negotiations concerning the real estate. He sent her a copy of the contract proposing a sale for \$35,000 and advised that this be signed. At one time she told Mr. Pollock that she would do whatever met with the approval of her brother Edward and Mr. Pollock. She acknowledged receipt of something

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, under the act of March 3, 1879, entitled "An act to provide for the better management of the public lands, and for other purposes."

over \$19,000, which it appears was the identical sum which Scott, Bancroft, Martin and MacLeish sent to Grace E. Sturges on April 17th, with a letter saying that the check was "in partial distribution" of the money realized from the sale of real estate. While the circumstances raise a strong suspicion that Mr. Follock had authority to execute the contract for Mrs. Hall, yet it falls short of the proof necessary to show such authority. We can only surmise but cannot say that authority has been established. The conclusion of the chancellor in this respect was justified.

Petitioners by cross-appeal question the correctness of the decree with reference to the distribution of certain interest. The sale brought \$325,000, one half of which or \$162,500 was paid in cash, the balance in seven promissory notes of \$14,542.86 each, dated March 24, 1925, payable on or before one year from date with interest at seven per cent per annum. Petitioners claim that they are entitled to six of these notes (the other going to the minors) and also to \$1932.12, representing a surplus of cash over the adults' share in the proceeds of the sale and the further sum of \$10,000, which is the amount which under the contract was deposited with the Chicago Title & Trust Company by Albert and Bernstein to apply on the purchase price.

It was error to award Edward Spencer Sturges, Howard Putnam Sturges and Grace E. Sturges any part of the interest on the aforesaid notes. They were entitled to \$14,300 each, and the sale produced sufficient cash to pay them this amount. They are entitled to whatever interest any undistributed portion of this fund may earn while in the hands of the master, but they are not entitled to any interest on the notes. The petitioners are also entitled to any excess of cash paid at the sale over this amount except as to the minors' share and the share of Mrs. Hall. As she is not bound by the contract, she is entitled to one-seventh of the cash and one

of the purchase money notes.

Petitioners are also entitled to the \$10,000 deposited as earnest money with the Chicago Title & Trust Company.

The decree is in all respects affirmed except as indicated, and the cause is therefore remanded that the decree may be corrected accordingly. The costs of this appeal are to be taxed against appellants Edward Spencer Sturges, Howard Fytnum Sturges and Grace D. Sturges.

AFFIRMED IN PART AND REVERSED IN PART
AND THE CAUSE REMANDED WITH DIRECTIONS.

Matchett, P. J., and O'Connor, J., concur.

by the American people.

Testimony was also elicited in the following manner:

On March 10, 1911, the following was asked:

The matter is in his hands. He is not

interested in the matter. He is not

interested in the matter. He is not

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JACOB A. ALBERT et al.,
Intervening Petitioners,
Appellants,

vs.

CAROLINE MARGARET STURGES HALL et al.,
Respondents,
Appellees.

CROSS APPEAL FROM DECREE
ENTERED BY JUDGE IRA RYDER
IN THE CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE MOSBURY DELIVERED THE OPINION OF THE COURT.

The above is the general number by which the cross-appeal of the intervening petitioners has been docketed in this court. We have this day filed an opinion in case number 31814, with which the above cause was consolidated for hearing.

For the reasons stated in that opinion the decree is affirmed in part and reversed in part and the cause remanded with directions.

AFFIRMED IN PART AND REVERSED
IN PART AND THE CAUSE REMANDED
WITH DIRECTIONS.

Ketchett, P. J., and O'Connor, J., concur.

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THE ROY IVERSEN COMPANY,

a Corporation,

Appellee,

vs.

UNITED STATES LLOYD'S, INC.,

a Corporation,

Appellant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover a fire loss of automobiles alleged to be covered by an insurance policy issued by the defendant. Upon trial the jury returned a verdict for the plaintiff for \$4085.46, upon which judgment was entered. Defendant appeals.

As there must be another trial, we do not refer to the evidence at any length.

There were submitted to the jury these vital questions of fact: (1) Was proper notice given to the defendant of the location of the burned automobiles at a place other than that named in the policy? (2) Was Mr. Throop, an insurance broker, the agent for the defendant with power to accept notices and premiums? (3) Were the monthly statements of plaintiff of automobiles on hand correct, or were they false so as to constitute an evasion under the terms of the policy? And (4) Were the premiums paid? The jury should have been permitted to consider these questions and the facts relating thereto free from any prejudicial influence from the trial court. Unfortunately the record shows to the contrary.

Most of the defendant's brief is filled with page after page of quotations from the record, giving verbatim the language of the presiding judge upon the trial tending to support the charge that, by reason of his undue and frequent interruptions,

defendant was deprived of its right to present its defence in an orderly way and to receive from the jury an unbiased and impartial judgment. We shall not undertake to copy the record supporting this charge. It is sufficient to say that it is amply sustained. Such conduct on the part of a trial judge "though it make the unskilful laugh, cannot but make the judicious grieve."

There is no reflection upon the conduct of plaintiff's counsel, which was impeccable. If the plaintiff has a meritorious case, it is its misfortune that through no fault of its own there has been a mistrial. Unfairness to one party usually results in unfairness to the other, and is costly to both.

For the reasons above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

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32 - 31623

GEORGE F. SATTERLEE,
Complainant,

vs.

MRS. EMMA A. FULLER, ALTA BLANKENHORN,
CHARLES CASSIDY, MRS. ALICE HOLT,
MRS. MIMMIE SATTERLEE, JAMES H.
TWOGOOD, ELIZABETH V. JONES, SARAH
H. CHAPIN, MRS. GARRIE C. COENRADT,
ARTHUR COENRADT, ALICE COENRADT,
MARY I. MERVIN, MRS. MARY H. DUNN,
MERET TWOGOOD, GARRIE TWOGOOD, WILLIAM
H. TWOGOOD, MISS LULU T. JONES, MRS.
BELLE I. DAVID, GEORGE A. SATTERLEE,
and ILLINOIS MERCHANTS TRUST COMPANY,
a Corporation, Successor to THE MERCHANTS
LOAN AND TRUST COMPANY, Trustees,
Defendants.

ERROR TO SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On August 20, 1923, George F. Satterlee filed his bill of complaint in the Superior court of Cook county, praying for a construction of the last will and testament of Emily Satterlee, deceased, and that he be held to be a devisee under the will. A demurrer was sustained to the bill, it was dismissed for want of equity and the complainant appeals.

The material allegations of the bill are that complainant is a resident of St. Charles, Kane county, Illinois, forty-three years of age and the son of George A. Satterlee, one of the defendants; that on May 13, 1860, the defendant George A. Satterlee was married to Emma L. Ferson and that two children were born as issue of the marriage, one of them being complainant, and the other Oliver H. Satterlee, who died in infancy; that on January 10, 1906, Emily Satterlee, the mother of George A. Satterlee and the grandmother of the complainant, made and executed her will; that she died a short time prior to November 25, 1914, and that on the latter date her will was admitted to probate by the Probate court of Cook county, Illinois. The bill then sets up the will in full, the material portions of which are as follows:

Fourth. I also give devise and bequeath to my said son, George A. Satterlee, during his lifetime, all the use of and the rents, issues and profits arising from the premises known as No. 292 South Clark street, in said City of Chicago, more particularly described as follows:*****

Fifth. Should said George A. Satterlee contract a marriage subsequent to the date of this will, and as an offspring of such marriage any child or children be born to him, and be living at the time of his decease, I direct that at the death of said George A. Satterlee the said last above described premises, known as 292 South Clark street in said City of Chicago, be sold at public or private sale, at the discretion of my Executor, at such price for cash as to my Executor may seem best, and the net proceeds of such sale, after first paying any mortgage and charges on said premises, be distributed, and I give, devise and bequeath the same, as follows:

One half (1/2) to any such child, or children, of said George A. Satterlee, so born as aforesaid subsequent to this date; *****

Sixth. In the event of no such marriage and subsequent offspring of said George A. Satterlee, then I direct that at his death the property last above described and known as No. 292 South Clark street in the City of Chicago, be sold by my Executor, for cash as hereinbefore directed in Paragraph Fifth."

Then follows a provision for distribution of the proceeds to other persons.

The further allegations of the bill are that the estate of Emily Satterlee, deceased, was settled and the executor discharged by the Probate court of Cook county on May 3, 1916; that at the time of the making of the will Emily Satterlee, the testatrix, was about eighty-five years of age and her son George A. Satterlee, the defendant, about sixty years of age; that he was a widower at that time, the mother of the complainant being then dead, and that at the time of the making of the will the complainant was about twenty-one years of age. It is further alleged that shortly after the marriage of the complainant's parents, the father, George A. Satterlee, abandoned and deserted his wife and children, "who lived in the City of St. Charles, Kane county, Illinois, and that said George A. Satterlee continued to live in the city of Chicago, Illinois, and represented himself to be a bachelor" and concealed the fact that he had been married and that children were born to him as an issue of such marriage; that he concealed from his mother, Emily Satterlee, the fact that he had

been married and had children, and that at the time she made her will she did not know that her son had been married and had children.

It is then alleged that it was the intention of Emily Satterlee in making her will to make a provision for the children of her son George A. Satterlee "out of affection for the stock and for her own offspring and lineal descendants;" that the complainant being a grandson falls within the meaning and intent of the language used by the testatrix in her will, and that upon the death of complainant's father, the defendant George A. Satterlee, complainant will be entitled to receive part of the proceeds of the sale of the property at No. 392 South Clark street; that George A. Satterlee, complainant's father, is now over eighty years old and has no child or children living except the complainant; that no children were born to George A. Satterlee except the two children as hereinbefore stated; that the Illinois Merchants Trust Company is now acting as trustee under the will and as such has denied that the complainant is a devisee of Emily Satterlee under the will.

The prayer of the bill is that the will be construed so that it will appear that it was the intention of the testatrix to include the complainant under the fifth paragraph of the will; and the further prayer is that the trustee be directed "to recognize and treat your orator as a devisee under the last will and testament of said Emily Satterlee, deceased," and that upon the death of George A. Satterlee the trustee be directed to sell the property at 392 South Clark street and "if there is no other children hereafter born to said George A. Satterlee" that the trustee be directed to pay to complainant that part of the proceeds mentioned in paragraph five "or to pay the same to the heirs, administrators or assigns of your orator, if he be then not living at the date of the death of his father, George A. Satterlee."

and when we call for it, they too, "nothing has been achieved more."

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THE BUREAU OF THE ARMY AND NAVY, WASHINGTON, D. C.

Approved: _____
Special Agent in Charge

Approved: _____ Date: _____

Journal of Management Education 32(10) 1139-1154

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and the authors are grateful to the referees for their constructive comments.

THE UNIVERSITY OF CHICAGO PRESS

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The authors are grateful to the following for their help and cooperation:

reluctant to do so, and some of the more recent work has been done

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and some other factors. The following table shows the results of the analysis.

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Received 10 July 1998; accepted 10 July 1998

any other Government of any State or of any foreign country

with the following assumptions: (1) the number of observations is large enough to ensure that the asymptotic normality of the maximum likelihood estimator holds; (2) the true parameter values are in the interior of the parameter space; (3) the likelihood function is well behaved; and (4) the true parameter values are unique.

...and the

Approved for release on 11-29-2000 pursuant to E.O. 13526

1. The first of these is the fact that the system is not a simple one, and that it is not possible to describe it in terms of a single parameter.

Complainant contends that Emily Batterlee, the testatrix, intended by the fifth paragraph of her will to give one-half of the proceeds of the sale of the South Clark street premises to the issue of her son George A. Batterlee, and this, too, whether such issue were born before or after she made the will. A number of authorities are cited which counsel for the complainant contend sustain his contention. We think it would serve no useful purpose to analyze or discuss these authorities because we are clearly of the opinion that the language used by the testatrix in paragraph fifth is plain and unambiguous and not open for construction. The language of the will is that "should George A. Batterlee contract a marriage subsequent to the date of this will, and as an offspring of such marriage any child or children be born to him and be living at the time of his decease" that the property be sold and one-half of the proceeds be given "to any such child or children of said George A. Batterlee so born as aforesaid subsequent to this date." It is obvious that the testatrix had clearly in mind the objects of her bounty and that they were any child or children born to her son George A. Batterlee as an issue of any marriage he might contract subsequent to the date of the will. This is clear even if it be admitted, as alleged, that the testatrix did not know of the marriage of her son or of the birth of her grandson, the complainant.

The law has long been firmly established that "In construing a will the court has no power to make a will for the testator or attempt to improve upon the will which testator actually made. The court cannot begin by inferring testator's intention, and then construe the will so as to give effect to this intention, however probable it may be; nor can it rewrite the will, in whole or in part, to conform to such intention." 2 Pomeroy's Eq., Sec. 371.

In Downing v. Grisby, 251 Ill. 568, our Supreme Court

said (p. 572): "The intention of the testator, which must control in the construction of his will, is the intention expressed by its words and not an intention which it may be inferred from circumstances he might have had but has failed to express."

Under the rule of law announced in all the authorities it is plain that complainant cannot be held to be a beneficiary under the will of Emily Satterlee, deceased. He was twenty-one years old at the time the will was made, and the language of the will is clear and specific that the proceeds derived from the sale of the South Clark street property be given only to the child or children of George A. Satterlee, her son, who might be born as a result of a marriage contracted by him subsequent to the date of the will. Indeed, there is at least a strong inference that the testatrix intended to exclude complainant, and this too, although there is an allegation in the bill that she did not know of his existence, because this allegation seems in conflict with the language of the will.

The defendants contend that the bill was properly dismissed for the reason that the action is prematurely brought, and that the question is therefore wholly moot, because the time for making distribution of the proceeds of the property at 292 South Clark street has not arrived and may never arrive. Under the terms of the will, even if the complainant were a beneficiary he would not be entitled to any of the proceeds derived from the sale of the premises on South Clark street unless he survived George A. Satterlee, because the will provides that distribution of the proceeds be made to the children of George A. Satterlee provided they be living at the time of his death. Any interest under the will which the children of George A. Satterlee might claim was contingent and not vested, the contingency being that they survive their father, because the will in paragraph 6 pro-

vides that in event of no such marriage and subsequent offspring, viz., an offspring living at the time of the death of George L. Batterlee, then the proceeds of the South Clark street property was to be given to other persons.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Hatchett, F. J., and McSurely, J., concur.

which was in view of the fact that the
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 method, then the purpose of the test was to
 was to be used in other cases.
 The result of the test was as follows:

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HOLLAND FURNACE COMPANY,
a corporation,
Appellee,
vs.
JULIUS JANDELUNAS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$192, claimed to be due it for the balance of the purchase price of a furnace. There was a trial before the court and a finding and judgment in favor of plaintiff for the amount of its claim, and the defendant appeals.

Plaintiff in its statement of claim alleged that on October 31, 1924, it sold and delivered a furnace to J. E. Eilinskas and A. Wessel; that on February 6, 1925, a receiver was appointed for Eilinskas and Wessel and that on the same date the receiver by order of court sold the furnace to the defendant, the sale being made subject to an encumbrance of \$192, "which the defendant had knowledge of and assumed when he purchased said furnace together with other goods and merchandise sold by said receiver for which the defendant paid the sum of \$1000.00."

The defendant filed an affidavit of merits in which he denied any indebtedness; denied that he had any knowledge of any encumbrance upon the furnace; denied that he assumed or agreed to pay any encumbrance; denied that the plaintiff had a lien on the furnace; denied that he promised to pay plaintiff.

On the trial of the case plaintiff called the defendant under Section 33 of the Municipal Court act, who gave testimony to the effect that he did not know either Eilinskas or Wessel; that he knew nothing about a bill being filed in the Superior court of Cook

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county to dissolve the partnership between Zilinskas and Wessel; that he was passing the drug store one day and saw it was closed with a bailiff in charge; that he spoke to the bailiff, who told him that there was a receiver who was selling the place and gave him his name and address; that he went to see the receiver and asked about the sale of the property and was given an order permitting him to go into and look over the place; that on February 5, 1935, he bought the stock of merchandise from the receiver; that the receiver did not say anything about there being a balance due on the furnace; that he "didn't say a word. He said he didn't know anything about it." The witness then asked if he bought the furnace, and he replied, "Didn't mention anything about the furnace. I understood the furnace belonged to the building;" that he paid the receiver \$1000 and took possession of the place and conducted the business for a short time, but the business being poor he moved out; that in May, 1936, being nearly fifteen months after the sale, a representative of plaintiff called upon him and asked him if he "wanted to pay for this furnace. I said, no, I don't know who the furnace belonged to; I think it belongs to the man who owns the building;" that the representative then stated the plaintiff had a mortgage upon the furnace and the witness stated the plaintiff ought to go to the owner of the building for payment. Plaintiff also offered in evidence an order entered in the Superior court of Cook county in a case entitled Alexander Wessel v. Julius S. Zilinskas, which is as follows:

"This cause coming on to be heard upon the petition of Logan L. Mullins, receiver, to sell all of said receiver's right, title and interest in the goods, stock and fixtures including the leasehold at 2089 West 22nd street, Chicago, Illinois.

And it appearing to the court that one Julius Janelunas has offered for said property the sum of \$1000.00 cash and to assume the payment of a chattel mortgage thereon amounting to \$405.00 and to pay also what money may be due on a certain cash register as well as a furnace and the court being fully advised in the premises it is hereby ordered said receiver sell all his right, title and interest in property of such receiver for the sum of \$1000.00."

Plaintiff then called Roy Faulstick, who testified that he was a branch manager of plaintiff; that the furnace in question was installed by the plaintiff the latter part of October and first part of November, 1924; that along about May, 1925, he called on the defendant for payment of the balance of \$192, and that he did not recall what the defendant said in answer to his demand for payment. He further testified that the defendant said "I should go over and take the furnace if I wanted it, and that he would help me;" that the furnace was placed on a concrete floor in the basement of the drug store. This is all the evidence in the record, and we think it entirely insufficient to sustain the judgment. The order entered by the Superior court orders the receiver to sell "all his right, title and interest in said property of such receiver for the sum of \$1000.00." It recites that the defendant has offered \$1000.00 cash and agreed to assume the balance due under a chattel mortgage, amounting to \$405, and also pay what money was due upon a cash register as well as a furnace. But there is not a word of evidence that the defendant knew anything about this order nor is there any evidence that he entered into an agreement with the receiver to pay the balance due on the furnace; on the contrary defendant testified that nothing was said about the furnace, but that he thought it belonged to the owner of the building. It furthermore appears that plaintiff made no claim against the defendant until about fifteen months after the sale by the receiver. If plaintiff has a chattel mortgage on the furnace, as is intimated, it has its proper remedy. The furnace was still in the basement of the drug store and the evidence shows that the defendant never claimed to have purchased it.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and McSurely, J., concur.

HENRY M. HAGAN,
Appellee,

vs.

MADISON SQUARE BUILDING
CORPORATION,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$224.29 for court costs advanced and \$1355 for legal services. The trial of the case resulted in a verdict and judgment in favor of plaintiff for \$1224.29 and the defendant appeals.

The record discloses that plaintiff, who was a practicing lawyer in Chicago, was retained by the Pulliam Building Corporation through its agents, Hall and Ellis, to render certain legal services principally in an endeavor to collect rent due from divers tenants of the building corporation; that he began to perform such services about March, 1922, and continued until about July 13, 1923; that about the latter date Samuel Morris and William J. Panceo acquired all the stock of the Pulliam Building Corporation, which Corporation owned and operated a building at No. 125 West Madison street, and the name of the Corporation was changed to Madison Square Building Corporation, the defendant; that after the Panceo Brothers obtained control of the defendant corporation they severed the relations of Hall and Ellis with the defendant, and plaintiff's contention was and is that at the same time they terminated his connection with the defendant. On the other hand it is the contention of the defendant that plaintiff of his own accord ceased to represent the defendant for the reason that the defendant had taken the building from Hall and Ellis, who were his friends and clients.

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The evidence further shows that during the time plaintiff was representing the defendant corporation he advanced court costs aggregating \$224.89, no part of which had been repaid to him; that he rendered legal services in a number of matters, mostly confession of judgments against defendant's tenants, for which he presented his itemized bill, wherein he claimed \$1355. Plaintiff offered evidence showing that he had made the disbursements and also evidence showing the amount of time he had expended in the performance of the legal services, as well as evidence tending to show the reasonable value of such services. The defendant offered no evidence on these two questions, but its evidence was confined to the question as to whether plaintiff had voluntarily severed his relation with the defendant or whether the defendant had taken the matters out of his hands.

The defendant contends that the finding of the jury to the effect that the defendant took the matter out of plaintiff's hands and severed relations with him, is against the manifest weight of the evidence, and further maintains that even if this contention be not sustained, the amount awarded is grossly excessive.

1. Is the finding of the jury to the effect that the defendant took the matters out of plaintiff's hands, against the manifest weight of the evidence? The defendant called four witnesses who gave testimony tending to show that after the Paneco Brothers had obtained control of the defendant corporation and after they had taken the management of the building from Hall and Ellis, plaintiff refused to continue as attorney for the defendant, and in this connection the evidence tends to show that Hall and Ellis, the agents, were and had been clients of plaintiff for some time and that they were friendly with him, and that in these circumstances plaintiff refused to continue to represent the defendant in

the matters which he then had. On the other hand, plaintiff offered evidence to the effect that the defendant, through the Panama Brothers, requested him to turn over all matters to another attorney and to send his bill to defendant and it would be paid. We think it would serve no useful purpose to analyze the testimony of the several witnesses in detail. The question was squarely presented to the jury under proper instructions (both counsel stated on the trial that they had no objections to the instructions), and its finding was sustained by the trial Judge. The jury and the trial Judge both saw and heard the witnesses testify on the stand and were in a much better position to determine the truth of the matter than are we sitting in a court of review. Upon a careful consideration of all the evidence in the record we are of the opinion that we would not be warranted in disturbing the verdict on the ground that it is against the manifest weight of the evidence.

2. Is the verdict excessive? Plaintiff's claim was for \$224.29 for costs advanced by him and services for which he claimed \$1355, making a total of \$1579.29. The jury allowed \$1224.29, so it is obvious that the verdict was made up of the \$224.29 and \$1000 for attorney's fees. In other words, the jury allowed plaintiff \$355 less for his services than he claimed. But the defendant contends that this amount is grossly excessive because the evidence shows that the legal services rendered by plaintiff were not at all of a difficult character; that he had fifteen different matters, eleven of which were confession of judgments on leases, two proceedings were distress for non-payment of rent, and one was a suit brought before a justice of the peace, while another matter was not placed in suit at all; that these services might be performed by a skillful stenographer under the direction of her employer, and that therefore a rate of ten dollars

a day was unwarranted, as above stated.

Plaintiff testified with considerable detail as to the services rendered by him in the several matters and no question is raised that the services were not performed. And a lawyer called by the plaintiff testified what such services were reasonably worth. The defendant called no witness on this question and while this court is not bound by the evidence in such matters, but may take into consideration its own knowledge of the value of such services (Hirtzel v. Ball, 205 Ill. App. 244), and while the amount allowed by the jury may be more than we would have fixed had the responsibility been ours, yet upon a consideration of the entire record we are constrained to hold that the amount is not so excessive as to require interference on our part.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

191 - 51802

FLORENCE EISENBERG, Administratrix
of the Estate of Earl W. Eisenberg,
Deceased,

Appellee,

vs.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff as administratrix of the estate of her deceased five year old son brought suit against the City of Chicago to recover damages on account of the wrongful death of the deceased. There was a verdict and judgment in her favor for \$5,000 and the defendant appeals.

It appears from the evidence that at about seven o'clock of the evening of May 16, 1925, Earl W. Eisenberg, together with some other boys, was gathering flowers in Normal avenue near 93rd street, and that Earl fell into an open catch basin which was connected with the sewer in Normal avenue, and was drowned. Normal avenue is a north and south street in Chicago and Earl lived with his parents on the west side of Normal avenue just below 92nd street, an east and west street, and about 300 feet north of the catch basin. The catch basin was located near the east side of Normal avenue.

The City of Chicago had constructed a sewer in Normal avenue some years prior to the date in question, and there was a circular catch basin about three feet in diameter, built of brick, which connected with the sewer. The iron lid which covered the catch basin had been removed. The mortar had fallen into decay and some of the top bricks of the catch basin had fallen away. There was water in the catch basin, which was about two feet from

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JANUARY 10, 1908
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the surface of the street and was about four or five feet deep. The roadway of Normal Avenue was not paved, but some where near the middle of the street there was a roadway that was used by automobiles and trucks. There were no sidewalks on this street. There was a heavy growth of grass and flowers in the neighborhood. The grass around the catch basin appears to have been very heavy, obscuring the opening of the catch basin to a considerable extent. It was the custom of the children in the neighborhood to pick wild flowers, and on the evening of May 15, 1945, Mari, after he had had his supper, went with other boys to pick flowers. He with another boy was near the catch basin in question when Mari fell into the catch basin and was drowned. The evidence further tends to show that the catch basin had been open for some time prior to the day of the accident. One witness testified that he had passed near the catch basin about the first of March and saw that there was no cover over it. The deceased left surviving him a number of brothers and sisters as well as his father and mother.

At the close of plaintiff's case the City asked for an instructed verdict, but the instruction was denied. The City called on its behalf the father of the deceased child, but he was not interrogated on any matter material to the issues involved. He had testified to considerable extent as a witness for the plaintiff. No other evidence was offered on behalf of the City and the court over-ruled the defendant's motion at the close of the case for an instructed verdict.

In this court the defendant argues that there should have been a directed verdict because the evidence was insufficient to show that the City had constructive notice of the defective catch basin. Defendant further contends that the evidence shows that the parents of the deceased child were not in the exercise of due care for the child's safety, but on the contrary were guilty of negli-

THE HISTORY OF THE CITY OF NEW YORK, FROM THE FIRST SETTLEMENT TO THE PRESENT TIME. BY J. C. CALVERT, ESQ. OF THE BAR AT NEW YORK. VOL. II. NEW YORK: PUBLISHED BY J. C. CALVERT, AT THE OFFICE OF THE NEW YORK GAZETTE, NO. 10, NASSAU ST. 1812.

gence which barred a recovery, and that the verdict is excessive.

Witnesses for the plaintiff were called and gave testimony to the effect that they did not have any notice or knowledge that the cover was removed from the catch basin or that there was a catch basin at the place in question. These witnesses were examined at considerable length by counsel for the defendant, and there was no evidence directly contradicting any of the testimony given by them. In these circumstances the questions were for the jury, and we think the finding of the jury in favor of the plaintiff is amply sustained by the evidence. It is the duty of the City to use reasonable care to keep its streets in a reasonably safe condition. Here the uncontradicted evidence is that this old catch basin was out of repair and was uncovered. It was concealed by a heavy growth of grass and weeds. We think the question was a proper one for the jury.

We are also of the opinion that the contention of the City that the evidence shows that the next of kin of the deceased were guilty of negligence is untenable. The evidence shows that all the children of the neighborhood in question were in the habit of picking flowers in the spring time; that the child had just eaten his supper at home; that he left the house with some of the neighbors' children and had not been gone to exceed fifteen minutes when he fell into the catch basin and was drowned. The evidence, as above stated, is to the effect that the catch basin and its lack of cover were unknown to them. There were a number of children in the family, and whether there was any negligence on the part of the next of kin of the deceased, under the circumstances disclosed by the evidence was at most but a question for the jury. If any of the beneficiaries were guilty of negligence which contributed to the death of the child, no recovery can be had. Hazel W. Houghton-Danville Bus Co., 310 Ill. 38. Under the law and the evidence in

being with father's a partner, and that the parties in question
 statement for the plaintiff were called and gave the
 names of the other party and that they were called to examine
 and the court was informed that they were called to examine
 each other at the place in question. These witnesses were ex-
 amined at the place in question by the court and the witness, and
 then was an answer given by the witness and the court
 given in answer. In these proceedings the court was told the
 fact, and we took the finding of the fact in favor of the plain-
 tiff is being supported by the evidence. It is the duty of the
 jury to see whether or not the evidence is a reasonable
 one. There are no reasonable evidence in this case and
 each party was not of course and was answered. It was answered
 by a body of facts and words. To show the plaintiff was a
 person was for the jury.

To see also of the witness that the evidence of the
 fact that the witness showed that the fact of the witness
 were called to examine in question. The witness were told
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 the fact of the fact, the fact of the fact and the witness in

this case, we would not be warranted in disturbing the verdict.

A further contention is that the verdict and judgment are excessive. We think this point is without merit. United States Brewing Co. v. Stoltzenberg, 113 Ill. App. 438, affirmed in 211 Ill. 831; Chicago City Ry. Co. v. Strong, 129 Ill. App. 511; Swan v. Boston State, 161 Ill. App. 84. In each of the cases cited, where the deceased was a child about five years of age a verdict of \$5,000 was sustained, and it was held in these cases that the question of the amount of damages was one for the jury.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Satchett, P. J., and McSherry, J., concur.

With this, we will not be surprised to find the following the result.

A further illustration is that the results are not

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MARY L. KENT and AMOS W.
MARTIN, Trustees,
Appellees,

vs.

WILLIAM E. MEYNERS and LILLIAN
MEYNERS,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On May 19, 1926, complainants filed their bill to foreclose a trust deed on certain real estate in Chicago. There was a decree in their favor and the defendants appeal.

The record discloses that on June 15, 1923, the defendants purchased the property in question and to secure part payment of the purchase price made and executed their installment note for \$4393.57, payable \$40 a month, the first installment being due and payable July 15, 1923, and the last, for the sum of \$53.57, on August 15, 1932; and to secure the payment defendants executed their trust deed conveying the property in question to Amos W. Martin, trustee. The note was payable at the office of A. W. and Edward W. E. Martin, Chicago, and contained a provision that if default be made in the payment of principal or interest and such default should continue for thirty days, the entire indebtedness might, at the option of the owner of the note, be declared due and payable without notice.

The trust deed provided that the defendants should pay all taxes and assessments on the premises before July 1st of each year; that they should permit no waste, but would keep the premises in a good state of repair and that they would keep the building insured. It was alleged in the bill that all installments, both principal and interest, had been paid which fell due on or before March 15, 1926, but that no other payments had been made;

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that the defendants had made default in the payment of the general taxes of 1925, amounting to \$263.33, and that there was also unpaid an installment of a special assessment of \$4.29; that the defendants had permitted the buildings on the property to waste and decay, which would require an expenditure of \$1000; that the property was not worth in excess of \$5500 and was scant security for the indebtedness. It was further alleged that on account of the non-payment of the installments of April 15th and May 15th, 1926, and on account of the defendants allowing the premises to be in a bad state of repair, complainants declared the whole indebtedness due and that the balance due on the note was \$3051 with interest from March 15, 1926.

On July 16, 1926, the defendants filed their answer, in which they denied default in the payment of the installments which fell due on April 15th and May 15, 1926, but averred that they tendered these installments on due dates, but that the defendants refused to accept such payments; that after the filing of the bill the solicitor for the complainants agreed with the defendants to accept payment of the installments then unpaid provided the defendants would repair the premises; that the repairs were made and the installments offered, but that the solicitor for the complainants refused to accept payment unless he was paid an unreasonable solicitor's fee. The answer admitted that the taxes for 1925 had not been paid, but alleged that this was pursuant to an agreement made. The defendants denied that there was any right of foreclosure.

The cause was referred to a master and the record shows that the defendants did not appear nor were they represented. Complainants made their proof and the master made up his report. He afterwards permitted the defendants to offer their evidence and they proceeded to do so. After the evidence was all in the master made up his supplemental report, in which he confirmed his original report.

The master found, inter alia, that the defendants had failed and neglected to pay the general taxes for 1925, amounting to \$263.33, and that they had also failed to pay an installment of a special assessment of \$4.29. There was a further finding that on account of the failure of defendants to pay the installments due on April 15th and May 15th, 1926, respectively, the complainants had elected to declare the whole indebtedness due; that the defendants had permitted waste of the premises; that the complainants had paid out \$5 on June 22, 1926, for insurance on the property. The master then stated the account but omitted the items for the taxes and the installment of the special assessment. After the subsequent report of the master was made, the defendants filed objections. One was that the master had found that the defendants had permitted and suffered waste to the premises, while the undisputed evidence showed that the defendants had expended \$700 in making repairs. Another objection was that the master found that there was default in payment of the taxes for 1925.

There was no testimony before the master that any waste had been permitted, and the testimony shows that the defendants had paid taxes on May 20, 1926, the day after the bill was filed. Just why the master over-ruled the objections filed, we are unable to understand, because the taxes were paid, but this worked no injury on the defendants as the amount of the taxes were not included in the decree.

On the hearing before the master the complainant Ames W. Martin testified as to the merits of the case. He testified that no installments had been paid after March 15, 1926, and that on account of the failure of the defendants to pay the installment due April 15, 1926, complainants had elected to declare the entire indebtedness due. There was no evidence that the defendants had permitted waste on the premises, except as might be

inferred from the testimony offered on behalf of the defendants that they had expended \$700 in repairs on the property. The entire indebtedness could not have been declared due for the failure to pay the May installment because it was due on May 15th and the bill was filed on May 19th, four days after, while the note provided that any default for which the entire indebtedness could be declared due must have continued for at least thirty days. There was no default in the payment of the taxes or the installment of the special assessment which might be taken advantage of in this respect, because the trust deed provided that all taxes and special assessments levied against the property must be paid before July 1st of each year. So it appears that the only breach claimed which authorized the foreclosure, as testified to by Amos Martin, was the failure to pay the installment of \$40 due April 15, 1926.

William E. Meyers, defendant, testified that in his payments of the various installments he dealt nearly all the time with the solicitor for the complainants, Edward H. S. Martin, who, the evidence shows, is a son of the complainant and associated with complainant Amos W. Martin in the practice of law. Meyers further testified that he saw Edward H. S. Martin at the latter's office on April 13, 1926, having gone there to pay the installment due on that date, but that Mr. Martin refused to accept the payment unless the premises were repaired. The testimony of this witness is further to the effect, we think, that he agreed to make the repairs and that this agreement was reached after the bill was filed, as was alleged in the defendants' answer.

The evidence further shows that the defendants expended about \$700 in repairing the premises and that these repairs were made after the bill was filed and before July 1st. The evidence on behalf of the defendants tended to show that Edward H. S. Martin agreed to reinstate the mortgage and dismiss the suit provided repairs were

between them the testimony elicited on behalf of the defendant
that they had executed this in violation of the property. The
new indictment would not have been executed had the latter
to pay the new indictment because it was not on May 1900 and the
bill was filed on May 1901. From that date, with the same parties
that was before the court the same indictment was to be
the new indictment was of issue. It was not to be
that in the payment of the money on the indictment of the
indictment which might be taken advantage of in this respect, the
from the first had provided that all money and goods received
before the new indictment was to be paid before July 1st of same
year. It is apparent that the only person named with authority
the indictment, as testified to by some parties, was the failure to
pay the indictment of the lawfully 1st, 1900.

William H. Rogers, defendant, testified that in his
opinion of the various indictments he could swear all the time
with the evidence for the indictment, Edward H. H. Rogers, who
the evidence given, is a part of the indictment and executed with
indictment was W. Rogers at the residence of W. H. Rogers. Rogers
testified that he was Edward H. H. Rogers at the latter's office on
April 11, 1900, having some time in the indictment and on that
date, that that W. Rogers refused to accept the money which was
proposed was refused. The money was of this amount in Rogers
to the effect, as stated, that he refused to accept the money and that
this agreement was reached after the bill was filed, as was stated
in the indictment.

The witness further stated that the indictment was
about this in respect that Rogers and the other parties were made
after the bill was filed and before July 1st. The evidence on behalf
of the defendant is that that Rogers H. H. Rogers refused to
execute the indictment and that the indictment was refused.

made and installments then due paid; that the repairs were made and the installments tendered but were refused by Martin unless he was paid \$150 solicitor's fees, which the defendants refused to do. The testimony of defendant Meyers was corroborated to some extent by Gilbert H. Kufahl.

The record shows that the property in question was purchased by the defendants and the trust deed executed by them on June 15, 1923, and that since that time they have paid thirty-three installments covering a period of thirty-three months, the payments aggregating \$1342.57, leaving a balance due of \$3251, and that the defendants have expended in repairing the property about \$700.

The testimony offered on behalf of the defendants in reference to tenders of payments made as well as the repairs and the testimony to the effect that it was agreed that the suit would be dismissed and the mortgage reinstated, as above indicated, was not disputed.

In the circumstances disclosed by all the evidence in the record, as above set forth, we think it would be contrary to the evidence and inequitable to require the defendants to pay costs of this foreclosure suit, and that it would be inequitable to permit the complainants to declare the entire indebtedness due when the last installment would not be payable until 1932. But the complainants contend that even if it be assumed that the facts are as testified to by defendant Meyers, this would be no defense because Edward H. S. Martin had no authority to make any such agreement; that he did not own the note and trust deed, but was only the solicitor in the case. This, we think, cannot be maintained. The uncontradicted evidence is to the effect that the defendants dealt principally with Edward H. S. Martin in the making of the note and trust deed and in the payment of the several installments. In

these circumstances it would be unjust, we think, to hold that Martin did not have authority to make the agreement.

The decree of the Circuit court of Cook county is reversed and the cause remanded with directions to dismiss the bill.

REVERSED AND REMANDED
WITH DIRECTIONS.

Matchett, F. J., and McSurely, J., concur.

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Printed at the Government Printing Office, London

doi:10.1017/S0022292411000507

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AT A TERM OF THE APPELLATE COURT,

246 I.A. 629⁴

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois.

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

1.

Appellant.

Appeal from the
Circuit Court of Henry
County.

Anna Wells, appellee, instituted this suit against Walter Higgins, appellant, to recover damages for personal injuries sustained by her, and for the destruction of her automobile in a collision at a certain highway intersection.

For convenience the appellee will be called plaintiff and the appellant defendant.

The declaration filed by the plaintiff consists of six counts. The first two charge general negligence against the defendant in the management and control of his automobile; the third and fourth charge the defendant with driving and managing his automobile in violation of Section 33 of the Motor Vehicle Law of 1919, as amended, and with failing and refusing to give the right-of-way to the plaintiff who approached along the intersecting highway from the right of the defendant; the fifth and sixth counts charge the defendant with driving his automobile in violation of Section 42 of the Motor Vehicle Law of 1919, in that he was driving his automobile at a speed greater than was reasonable and proper, having regard for the traffic and the use of the way, and so as to endanger the life and limb, and injure the property of the plaintiff.

To the declaration the defendant pleaded the general

from the
State of New York
County

State of New York
County
City of New York
In Supreme Court
of the State of New York
County of New York
Docket No. 1447

1917, N. Y. S. C. 1447

Anna Wells, Appellee, instituted this suit against

Robert Williams, Appellant, as executor of the

estate maintained by her, and for the destruction of her

automobile in a collision at a certain highway intersection.

For convenience the appellee will be called plaintiff

and the appellant defendant.

The declaration filed by the plaintiff consists of six

paragraphs. The first two paragraphs narrate the facts

relevant in the management and control of his automobile; the

third and fourth paragraphs the defendant with driving and managing

his automobile in violation of Section 42 of the Motor Vehicle

Law of 1916, as amended, and with driving and managing to give

the right-of-way to the plaintiff who approached along the

intersecting highway from the right of the defendant; the fifth

and sixth paragraphs charge the defendant with driving his automobile

in violation of Section 42 of the Motor Vehicle Law of 1916, in

that he was driving his automobile at a speed greater than was

reasonable and proper, having regard for the traffic and the use

of the way, and so as to obstruct the free and lawful and proper

use of the highway.

The declaration also contains the prayer for judgment.

issue. A jury trial was had which resulted in a verdict in favor of the plaintiff for \$3000. The trial court, after overruling the motion for a new trial, entered judgment on the verdict for the said sum of \$3000. This appeal is prosecuted by the defendant from that judgment.

The injury complained of by the plaintiff as a result of the collision, as charged in her declaration, occurred on July 30, 1925, at what is known in this record as the "Ulah Corners". It appears from the evidence that the plaintiff, accompanied by her friend Irene Hoyt, on the day of the collision was driving her Ford Coupe west along the state road. Her contention is that she was driving on the north side of the road and was driving at a speed of about twenty-five miles an hour; that as she approached the intersection she looked to see if anything was coming from the south but saw no one and continued on to the intersection; that just as she was entering the intersection she saw defendant's car approaching from the south, but it had not yet entered the intersection but was approaching it; that although the first to enter the intersection and therefore having the right-of-way, she took her foot from the accelerator and started to put it on the brake, then seeing that defendant's car was coming straight on and knowing that if she slowed up her car would be struck, she did not apply the brakes but put her foot on the foot feed and continued on across the intersection, believing that to be the only way to avoid a collision, that just as she passed the center of the intersection, still being on the north side of the road, the rear of her car was struck by the front of the car of the defendant, her car was turned over and either rolled or slid along the state road towards the west and was partly turned around and headed in a southeasterly direction. The plaintiff was thrown violently

... A jury trial was had which resulted in a verdict in
favor of the plaintiff for \$2000. The trial court, after
reversing the motion for a new trial, entered judgment on the
verdict for the said sum of \$2000. This appeal is prosecuted
by the defendant from that judgment.

The largest complaint of the plaintiff is a finding
of the collision, as charged in her declaration, occurred on
July 21, 1925, at which time the plaintiff was driving
eastward. It appears from the evidence that the plaintiff
was driving her Ford Coupe west along the state road. Her con-
tention is that she was driving on the west side of the road
and she claims to have seen the defendant's car approaching
that as she approached the intersection she looked to see if
anything was coming from the south but saw no one and continued
on to the intersection; that just as she was entering the
intersection the new defendant's car approached from the south,
but it had not yet entered the intersection and was approaching
it; that although she tried to enter the intersection and
therefore having the right-of-way, she took her foot from the
accelerator and started to get it on the brake, when seeing
that defendant's car was coming straight on and knowing that
if she slowed up her car would be struck, she did not apply the
brakes but put her foot on the foot pedal and continued on across
the intersection, believing that to be the only way to avoid a
collision, that just as she passed the corner of the intersection,
still being on the north side of the road, she heard of her car
was struck by the front of the car of the defendant, but she was
turned over and either rolled or slid along the state road
towards the west and was partly turned around and headed in a
southeasterly direction. The plaintiff was injured physically

from the car, her face was badly cut, seven ribs were fractured, and serious injuries to her neck and spine were sustained.

It is the contention of the defendant that at about 4 o'clock in the afternoon of July 30, 1925, the plaintiff, accompanied by Mrs. Hoyt, drove her Ford coupe west on said east and west road toward said intersection, and that a little in advance of her in point of time, the defendant, driving a Chevrolet touring car, was approaching the same intersection from the south on the said road known as the Ulah road; that the defendant occupied the front seat along and that in the back seat were the daughter of the defendant's former house-keeper and two of her girl friends; that as defendant approached the intersection he brought his car to a full stop a few feet south of the south line of the intersection and looked both east and west but saw nothing and heard nothing; that his car was to the east of the center of the north and south road and that he then started his car north into the intersection not exceeding five miles an hour; that when he had moved forward about a cars length he saw bearing down on him from the east and travelling on the south part of the road, plaintiff's car, which was coming at a high rate of speed; that to avoid a collision he at once applied the foot brake and veered his car sharply to the left, but that the plaintiff's car did not slacken its speed or change its course, but speeding on straight west till either the left front or rear wheel of her car hit the hub cap of the right front wheel of defendant's car, bounced up on the front fender, upset and rolled over several times, coming to a stop in the center of the road three or four rods west of the intersection; that the defendant's car was not damaged, in the collision, except the front hub was knocked off the right front wheel and the front part of the right front fender was bent down to the

That the car had been driven by the defendant.

and serious injuries to her neck and spine were sustained.

It is the contention of the defendant that at about

1:15 p.m. on the afternoon of July 20, 1925, the defendant

operated by Mrs. Hoyt, drove her Ford coupe west on Main

and west road toward said intersection, and that a little

as a matter of fact an hour or more before the collision

defendant having met and accompanied the same defendant

from the south on the said road toward the Ford coupe

the defendant occupied the front seat alone and that in the

front seat were the defendant's two children, namely

keeper and two of her girl friends; that an defendant approached

the intersection he brought his car to a full stop a few feet

south of the south line of the intersection and looked north and

and west but saw nothing and heard nothing; that his car was so

the east of the center of the north and south road and that he

was stopped at the north light and intersection and waiting

five minutes or more; that when he had moved forward about a car

length he saw bearing down on him from the east and traveling

on the south side of the road, plaintiff's car, which was coming

at a high rate of speed; that to avoid a collision he at once

applied the foot brake and veered his car sharply to the left,

but that the plaintiff's car did not check its speed or change

its course, but speeding on straight west till after the left

front or rear wheel of her car hit the hub and axle of the right

front wheel of defendant's car, jammed up on the front fender,

upset and rolled over several times, coming to a stop in the

center of the road three or four rods west of the intersection;

that the defendant's car was not damaged in the collision,

except the front hub was knocked off the right front wheel and

wheel and the crown thereof bent in.

The questions of fact as presented by the record are whether or not the defendant was guilty of negligence, as charged in the declaration, and was the plaintiff guilty of contributory negligence, together with the facts as to the extent of ~~the~~ injuries received by the plaintiff and as to the alleged damages to her car, if any.

The testimony bearing upon the rate of speed and the management of the two cars together with their respective locations at and immediately before the collision, is conflicting.

The plaintiff and Mrs. Hoyt each testified that the plaintiff's car entered the intersection before defendant's car reached it. The defendant and the witness Richel testified that the defendant reached the intersection first. If the testimony of the defendant be taken as true, then the cars reached the intersection at about the same time. The defendant claims he stopped just before he reached the intersection at a point where his vision was obscured, towards the east, by a hedge and weeds; that he looked towards the east, saw nothing because of the hedge and weeds, and then entered the intersection and when he had gone on the intersection only a few feet he saw the car of the plaintiff six or eight feet from him. It is quite evident from the evidence that the plaintiff reached the intersection first or that she was close to it at the time the defendant entered it, and was approaching from the right of the defendant.

From a reading of the record in this cause, we are convinced that it peculiarly presented a case for a jury. The questions of fact have been passed upon by a jury. The jury heard and saw the witnesses and had before them all the corroborative circumstances supporting the contentions of the

and the crown thereof in.

The question of fact as presented by the record and whether or not the defendant was guilty of negligence, as charged in the declaration, and was the plaintiff guilty of contributory negligence, together with the facts as to the alleged damages to her car, if any.

The testimony taken upon the facts of the case and the management of the two cars together with their respective locations at and immediately before the collision, is conflicting.

The plaintiff and her car were traveling west on Highway No. 1 when the defendant's car entered the intersection before the plaintiff's car reached it. The defendant and the witness Richard testified that the defendant entered the intersection first. It was testimony of the defendant he taken as true, when the car reached the intersection at about the same time. The defendant stated he stopped just before he reached the intersection at a point where his vision was obscured, towards the east, by a hedge and weeds; that he looked towards the east, saw nothing because of the hedge and weeds, and then entered the intersection and when he had gone on the intersection only a few feet he saw the car of the plaintiff and it came from the east. It was quite evident from the evidence that the plaintiff reached the intersection first or that she was alone at it at the time the defendant entered it, and was approaching from the right of the defendant.

From a reading of the record in this cause, we are convinced that it peculiarly presented a case for a jury. The questions of fact have been passed upon by a jury. The jury heard and saw the witnesses and had before them all the corroborative circumstances supporting the contentions of the

respective parties. The rule is that the verdict of a jury will not be set aside by an appellate court unless the court can say that it is manifestly against the weight of the testimony. After an examination of the record we are not prepared to say that the verdict of the jury is manifestly against the weight of the evidence.

The defendant complains of the first and second instructions given on the part of the plaintiff because they do not inform the jury that a verdict must be based on a finding from a preponderance of the evidence. We have examined the instructions complained of and whatever error may have intervened, if any, in plaintiff's instructions one and two because they failed to tell the jury that their finding must be based upon a preponderance of the evidence, it was cured by the fourth instruction and the fifth modified instruction given on the part of the defendant. The fourth given instruction for the defendant is as follows:

"You are instructed that the plaintiff is required by law to establish her case by a preponderance or greater weight of all of the evidence before she can recover. And you are further instructed that if the plaintiff has not so proven her case, or if the evidence is evenly balanced, or if you are unable to determine from the evidence as to where is the preponderance of the evidence, or if the preponderance of the evidence is in favor of the defendant, then in any of such cases you should find the defendant not guilty."

The fifth modified instruction given on the part of the defendant reads as follows:

"You are instructed that the negligence charged against the defendant must be proven by a preponderance or greater weight of all the evidence in the case, and that you have no right to assume, presume or guess at it; and that under no condition of the proofs would the burden be upon the defendant to prove he was not negligent; proof of the injury to the plaintiff would not of itself charge the defendant with liability or cast upon him the burden of proving that he was not guilty of negligence. But you are instructed that the burden is upon the plaintiff to

...The rule is that the verdict of a jury
shall not be set aside by an appellate court unless the court
can say that it is manifestly against the weight of the testimony.
There is no examination of the record as to whether or not
the verdict of the jury is manifestly against the weight
of the evidence.

The defendant complains of the first and second
instructions given on the part of the plaintiff because they
do not inform the jury that a verdict must be based on a finding
of a preponderance of the evidence. We have examined the
instructions complained of and whatever error may have been
committed, in any of plaintiff's instructions one and two become
immaterial to tell the jury that their finding must be based
on a preponderance of the evidence, it was cured by the
fourth instruction and the fifth modified instruction given on
the part of the defendant. The fourth given instruction for
the defendant is as follows:

"You are instructed that the plaintiff is
entitled to recover if he has established by a preponderance
of the evidence that he is entitled to recover. And you are further
instructed that if the plaintiff has not so proved
his case, or if the evidence is evenly balanced,
or if you are unable to determine from the
evidence as to where in the preponderance of the
evidence, or if the preponderance of the evidence
is in favor of the defendant, then in case of doubt
you should find for defendant and dismiss."

The fifth modified instruction given on the part of the
defendant reads as follows:

"You are instructed that the defendant
is entitled to recover if he has established by a preponderance
of the evidence that he is entitled to recover. And you are further
instructed that if the defendant has not so proved
his case, or if the evidence is evenly balanced,
or if you are unable to determine from the
evidence as to where in the preponderance of the
evidence, or if the preponderance of the evidence
is in favor of the plaintiff, then in case of doubt
you should find for plaintiff and dismiss."

prove by a preponderance or greater weight of all the evidence in the case that the defendant was, at the time in question, guilty of the negligence charged against him. And if in this case the plaintiff has failed so to prove such negligence, or in case the evidence on that point is evenly balance or preponderates in favor of the defendant, or in case the evidence on that point is in such a state of doubt or uncertainty as to make it impossible for you to determine from the evidence as to which side has the preponderance or greater weight of the evidence, then you are instructed that in any such state of the evidence there can be no recovery in this suit."

Plaintiff's second instruction is criticised by the defendant not only for the reason that it failed to inform the jury that their finding must be based upon a preponderance of the testimony, but for three other reasons. The first of the additional reasons is that the instruction submits to the jury a question of law, that is, whether the plaintiff had the right-of-way over the defendant. If the instruction is open to objection on this ground, the defendant is in no position to complain. In his first modified instruction he presented to the jury, as a question of fact, the same issue which he now insists was a question of law. In that instruction the defendant told the jury:

"Even though you may believe from the evidence and the instructions of the court that the plaintiff's car, at the time and place in question, had the right-of-way, still, that fact, if it be a fact, did not relieve the plaintiff from the exercise of ordinary care and caution for her own safety and the safety of her automobile."

Again in his given instruction No. 2 the jury were told, by the defendant, that if they believe from the evidence that the defendant, under all the facts and circumstances shown by the evidence, was in the exercise of ordinary care and observance of the law in operating his automobile throughout the entire occurrence in question, then they should find the

defendant not guilty. This instruction plainly left it to the jury to determine whether or not the defendant observed the law, leaving it to be inferred that the only law he needed to observe was that which required him not to be negligent. The rule is too well known to require the citation of authorities to the effect that a party cannot be heard to complain of the giving of an instruction of the same character as one given at his own request. We have examined all of the objections made to the first and second instructions. In view of the state of the record the defendant is not entitled to have the judgment reversed because of the giving of instructions one and two on the part of the plaintiff.

The defendant also complains because of the refusal of the court to give his first and eleventh refused instructions. The court properly refused the said first and eleventh refused instructions because they were but duplications of the subject matter contained in other instructions which were given to the jury on the part of the defendant.

The defendant also complains of plaintiff's given instruction No. 5. This instruction is as follows:

"The court instructs you that if you find the defendant guilty, you should assess the plaintiff's damages; and in assessing her damages the plaintiff will be entitled to recover for all physical pain and anguish, if any, which you may believe from the evidence she has suffered or will hereafter suffer as a proximate result of said injury, and for any and all physical damages to her person, permanent or otherwise, which you may believe from the evidence were occasioned by said injury."

It is the contention of the defendant that this instruction submits to the jury as a proper element for damages the scars and disfigurements of plaintiff's face and the mental anguish arising out of the contemplation of them, when such facts are not proper or legal elements of damages.

We do not think there is any merit in the criticism of this instruction.

The question of fact having been determined by the jury and there being no reversible errors at law in the giving or refusing of instructions or the modifying and giving of instructions as modified, the judgment of the Circuit Court of Henry County, will be affirmed, which is accordingly done.

Judgment Affirmed.

and the authors of the book are to be commended for their efforts.

2014-15

and the fact that the system is not in a steady state.

See also: [List of all the authors in the journal](#)

Itself and its family, all killed as well as the

Classification of Value: Involvement or Use, should result in Product

1

James D. Thompson

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

6074
1927
246 L.A. 629⁵
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. ~~FRANKLIN H. BOGGS~~
~~AUGUSTUS A. PARFLOW~~, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures following, to-wit:

7770

Agenda No. 39.

In The
APPELLATE COURT OF ILLINOIS,
Second District

APRIL TERM, A. D., 1927.

SENACHWINE CLUB;
a corporation,
APPELLEE,

-VS-

WILLIAM E. GREEN,
APPELLANT.

Appeal from
Circuit Court,
Putnam County.

OPINION by BOGGS, J.

On July 23, 1920, Henrietta Lewis of Putnam County, Illinois, being the owner of the East Half of the Northeast Quarter of the Southeast Quarter of Section Sixteen, Senachwine Township, Putnam County, for the consideration of \$12.50 rental executed a lease therefor to appellant, running for the term of five years. Said lease in addition to the usual covenants and provisions contained the following clauses: "It is understood, covenanted and agreed that the party of the second part has the exclusive right of hunting, fishing and trapping upon the real estate herein described, and that this lease is made for no other purpose," and "It is mutually covenanted, understood and agreed by and between the parties hereto that the party of the second part (appellant) has at his option the privilege of renewing this lease at the termination thereof, for a further term of five years, at the same rental as provided by this lease." The parties thereto signed and sealed said instrument.

5750

APPELLATE COURT OF ILLINOIS,

Second District

APRIL TERM, A. D., 1927.

Appeal from
Circuit Court,
Putnam County.

SENATIMINE CLUB,
a corporation,
Appellant,

-vs-

WILLIAM A. BROWN,
Respondent.

OPINION BY JUDGE J.

On July 23, 1920, Henrietta Lewis of Putnam County,

Illinois, being the owner of the East Half of the Northeast
Quarter of the Southeast Quarter of Section Sixteen, Senatimaine
Township, Putnam County, for the consideration of \$12.50 rental
executed a lease therefor to appellant, running for the term of
five years. Said lease in addition to the usual covenants and
provisions contained the following clauses: "It is understood,
covenanted and agreed that the party of the second part has
the exclusive right of hunting, fishing and trapping upon the
real estate herein described, and that this lease is made for
no other purpose," and "It is mutually covenanted, understood
and agreed by and between the parties hereto that the party
of the second part (appellant) has at his option the privilege
of renewing this lease at the termination thereof, for a further
term of five years, at the same rental as provided by this lease."
The parties thereto signed and sealed said instrument.

Prior to the expiration of said lease, the lessor conveyed said premises by warranty deed to appellee herein. On July 18, 1925, some five days prior to the expiration of said lease, appellant gave written notice to Henrietta Lewis, Appellee Club and to C. P. Saccher, it's Secretary that he elected to have said lease renewed for the term of five years. He tendered a certified check for \$12.50 to Mrs. Lewis, and in the notice to said club and its Secretary he stated that he had tendered Mrs. Lewis a certified check for said amount. Thereafter, on March 4, 1926, Barnes, Magoon & Horton, attorneys for appellee, wrote appellant to the effect that appellee had purchased said premises from Mrs. Lewis, and returned said certified check. In said letter they advised appellant that he had no rights or privileges on said premises, and that if he trespassed thereon, proceedings would be instituted against him.

On October 14, 1926, a bill was filed by appellee setting forth that appellee was a corporation existing under the laws of the State of Illinois, organized "to provide its members with recreation, hunting and shooting grounds and accommodations; that for that purpose it has expended a large sum of money, to wit: more than \$50,000, in and about the purchase, leasing and acquiring, of hunting and shooting rights in the swamp and overflowed lands in Putnam County aforesaid; of which said lands it has been in the open, peaceable, exclusive and notorious possession, claiming to own the same, for more than seven years last past, as to such lands for which it has secured title. And as to such lands which it has leased, it has likewise been in the possession, exclusive and notorious control of during the term of said leases, some of which have been for more than five years, some for more than

which have been for more than five years, and for more than
historical control of land and the sale of land in the
leased, it has likewise been in the possession, exclusive and
it was found that, for as long as it was, it was
for more than seven years last past, as to such lands as were
exclusive and historical possession, arising as to the same,
of which said lands it has been in the past, present, and
in the past and present, it was found that, exclusive
purchase, leasing and receiving, of holding and conveying rights
sum of money, to wit: more than \$100,000, in and about the
accommodations; that for that purpose it has expended a large
members with recreation, hunting and shooting grounds and

ten years, and some for shorter periods, and as to said lands as to which it has acquired only the hunting and shooting privileges, it has exercised these rights and privileges by its members since acquiring said rights."

It is further averred in said bill that the lands so acquired by appellee club surround all sides of the above mentioned premises, and then avers "that prior to the purchase of the same by your orator, and about July 23, 1920, the then owner of said last mentioned tract of land, Henrietta Lewis, leased said last mentioned tract of land to the defendant hereinafter named for the period of five years from the said date, for the sum of \$12.50; * * * * * that said above mentioned lease had long since expired, and that appellant had no lawful right or authority on said premises, but that he claims "and has exercised against the will, wish and demand of your orator, to shoot, fish and hunt on said last mentioned tract of land" and had authorized divers other persons to hunt thereon. It is further averred that appellant was frightening the wild fowl away from the premises owned or occupied by said club, and damaging the use of the premises of appellee for such hunting purposes; and prays for a writ of injunction, enjoining and restraining appellant "from going upon, hunting, shooting, trapping or fishing upon said above mentioned premises." Said bill was sworn to by N. E. Simonsen, president of said club, and an order for temporary injunction was issued.

An answer was filed to said bill by appellant, to which was attached a haec verba copy of said lease. It was averred in said answer that appellant had elected to renew said lease for the period of five years; that he was rightfully in possession under said lease, and denying the allegations with reference to his alleged wrongful acts with reference

the years, and that the defendant's possession, and as to said lands
as to which it was not found that the defendant had exercised any
rights, it has exercised those rights and privileges by the
defendant's possession of said lands.

It is further averred in said bill that the lands are
occupied by appellee and throughout all sides of the above men-
tioned premises, and that every third party in the premises is
the defendant's property, and that the defendant, in the year
of said last mentioned tract of land, mentioned herein, located
said last mentioned tract of land to the defendant's possession
named for the period of five years from the said date, for the
sum of \$12.50; * * * that said above mentioned lands had
long since expired, and that appellant had no lawful right or
authority on said premises, but that he claims "and has ex-
ercised against the will, with and demand of your order, to
shoot, fish and hunt on said last mentioned tract of land,"
and had authorized diverse other persons to hunt thereon. It
is further averred that appellant was trespassing the will to
away from the premises owned or occupied by said child, and
frustrating the use of the premises of appellee for such hunting
purposes; and prays for a writ of injunction, restraining and
preventing appellant from going upon, hunting, shooting,
trapping or fishing upon said above mentioned premises."

Said bill was read in open court, and the defendant, in said
bill, and an order for temporary injunction was issued.
An answer was filed to said bill by appellant, in
which was attached a true and correct copy of said lands. It was
averred in said answer that appellant had failed to renew
said lease for the period of five years; that he was right-
fully in possession under said lease, and that the alleged
claim with reference to his alleged trespass made with reference

to hunting, fishing, etc. Upon the filing of said answer appellant entered a motion to dissolve said temporary injunction, and in support thereof filed his affidavit, which set forth that he was a man of financial responsibility, owning property of the value of \$5000. over and above incumbrances; that he had filed the lease in question for record on November 20, 1924, and that the same was recorded in Book 5 of Lease Records on page 67 in the Recorder's Office of Putnam County, Illinois, and setting forth the notice which he had given to Mrs. Lewis, to appellee club and to the secretary thereof; that in response to a communication from R. M. Barnes, one of the attorneys for appellee, he went to Barnes' office and informed him that his lease had been renewed by virtue of his having exercised his option to renew, and that it was in full force and effect for a term to expire July 23, 1930; that he appellant had continued in possession of said premises covered by said lease until the granting of said temporary injunction.

The court, on the hearing, denied said motion, and appellant prosecuted this appeal to reverse said order.

While counsel for appellee in the bill filed in this case and in the letter written to appellant refer to the instrument entered into between appellant and Mrs. Lewis as a lease, in their brief and argument in this court they have taken the position that said instrument was not a lease, but that the same was a mere license to appellee to hunt, fish and trap on said premises, and that said license, on the conveyance of said property by Mrs. Lewis to appellee club, was revoked.

As we understand counsel for appellee, it is not seriously contended that if the instrument in question was in fact a lease it was not renewed by the action of appellant electing to have the same renewed under his option. Whether

... to ...
... a motion to dissolve said temporary injunction
... filed his affidavit, which set forth
... of financial statements, which showed
... of the value of \$1000.00, over and above the amount
... in the amount of \$1000.00, was paid to the plaintiff
... the fact the same was recorded in Book 8 of Lease Records on
... in the Recorder's Office of Tipton County, Indiana,
... and ...
... to appellee and to the secretary thereof; that in response
... to a communication from H. M. ... one of the attorneys for
... he went to ... office and informed him that his
... had been ... of his ...
... to ... in ...
... term to expire July 26, 1930; that he ...
... in possession of said premises covered by said lease until the
... of said premises.

The court, on the hearing, denied said motion, and
appellant prosecuted this appeal to reverse said order.
While counsel for appellee in the bill filed in this
case and in the letter written to appellant when to the instrument
entered into between appellant and Mrs. Lewis as a lease, in
which both and argument in this court they have taken the
position that said instrument was not a lease, but that the
same was a mere license to appellee to hunt, fish and trap on
said premises, and that said license, on the expiration of
said property by Mrs. Lewis to appellee, was revoked.
As we understand counsel for appellee, it is not
seriously contended that if the instrument in question was in
fact a lease it was not revoked by the death of appellant
... in fact was never intended to be a lease.

or not this is conceded, we hold that if said instrument was in fact a lease, such election did amount to an extension of the same.

The mailing of a notice of intention to renew a lease, if received by the landlord, is sufficient. *Cass v. Fagan*, 221 App 209. And the agreement to pay rent is a sufficient consideration to support an option to renew. *Stanwood v. Kuhn*, 132 App. 466.

We are of the opinion and hold that the instrument is in fact a lease. It is in the ordinary form of lease, with the usual covenants contained in a lease, and it was signed and sealed by the parties. The mere fact that it may state that the premises were only to be used for certain purposes does not thereby constitute the instrument a mere license. This instrument would no more become a license because it limits appellant's rights thereunder to hunting, fishing, trapping, etc., than it would if it had limited the use of the premises to hog raising, sheep grazing or dairying purposes. But even if it should be conceded that the instrument only gave appellant a license to hunt, fish and trap, it was for a consideration, for a definite length of time, and would carry with it an interest in the land. Therefore, it could not be revoked. *Woodward et al v. Seeley et al*, 11 Ill. 157-164; *Camphouse v. Gaffner*, 73 Ill. 453-461; *Morris v. Lorenz*, 262 Ill. 115; *City of Chicago v. Green*, 238 Ill. 25-8.

Appellee based its right to the injunction in this case upon the averments of said bill, to the effect that there had been a lease to appellant and that it had expired. The bill is not framed on any other theory. No amendment of the bill was made after the answer in question was filed, and the instrument was set forth in haec verba as a part of the answer. Appellee therefore is not in a position at this time

answer. Appellee therefore is not in a position at this time under its bill to state that the instrument in question was not a lease.

Some question was raised by appellee with reference to the recording of the instrument in question being notice to it, as the law does not provide for the recording of leases. It is not disclosed by the bill as to when appellee acquired title to the land in question, so there is nothing to show that it was acquired prior to the recording of the lease. Without reference however to the recording of the lease, the bill discloses that appellant has been in possession of the premises, so that gave appellee notice of whatever rights appellant had therein. Williams v. Brown, 14 Ill. 200; Riley v. Quigley, 50 Ill. 304; Carr v. Brennan, 166 Ill. 108-111; Coari v. Olsen, 91 Ill. 272-280.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded with direction to dissolve said temporary injunction.

Reversed and Remanded with Directions.

and will be modified as a result of the investigation. The results of the investigation will be reported to the Commission.

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power for this purpose is needed now.

... ..

It is not intended by the Bill to prevent any person from applying to the court for an order for the return of a child.

www.elsevier.com/locate/jmr

which is available to either college or high school students.

to be printed and dated the 10th of August 1907

Amfiteatro de la Ciudad de México, D.F. September 26

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

246 I.A. 630¹

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of ~~April~~ ^{October}, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice. —

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

OCT 25 1927 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

CHARLES E. PALMER,

Appellant,

vs

Appeal from the
Circuit Court of
Kankakee County.

FRED W. MATESKA,

Appellee.

Jett, P. J.

This is an action in assumpsit brought by Charles E. Palmer, appellant, in the Circuit Court of Kankakee County against Fred W. Mateska, appellee, to recover on a promissory note of \$1,000 purporting to have been signed by F. W. Mateska, together with Herman Mateske and R. G. Mateske as co-makers.

The declaration consists of three counts. The first a special count on the note; the second a consolidation of the common money counts, and the third, upon an account stated. The declaration was accompanied by copies of the account and note sued on and an affidavit of claim stating that \$1403.⁶⁷~~76~~ was due to the plaintiff for money loaned.

To the declaration the defendant pleaded the general issue and a special plea denying the execution and delivery by him of the note in suit. His affidavit of merits denied signing, delivering or authorizing the delivery of the note, and also denied receipt of any consideration or any promise to pay the note by him.

Two trials of said cause were had in the court below. On the first trial the jury disagreed and on the second the jury found in favor of the defendant, appellee herein. Judgment was rendered on the verdict of the jury and appellant prosecutes this appeal.

CHAS. E. HARRIS

Attorney

CHAS. E. HARRIS
111 N. 3rd St.
St. Louis, Mo.

17

CHAS. E. HARRIS

Attorney

West, E. J.

This is an action in assumpsit brought by Charles E. Harris, appellant, in the Circuit Court of St. Louis County against Fred W. Watson, appellee, to recover on a promissory note of \$1,000 purporting to have been signed by F. W. Watson, together with interest thereon and F. W. Watson as co-maker.

The declaration consists of three counts. The first

alleges that on the 1st day of January, 1913, the plaintiff loaned to the defendant the sum of \$1,000, and that the defendant received the same and was obligated by virtue of the receipt and note signed by him to repay the same to the plaintiff on or before the 1st day of January, 1914.

The plaintiff for money loaned.

To the declaration the defendant pleaded the general

issue and a special plea denying the execution and delivery by him of the note in suit. His affidavit of verity denied

signing, delivering or authorizing the delivery of the note, and also stated that he was not present at the time the note was signed or delivered.

He was not present.

The trial of said cause was held in the court below.

On the first trial the jury returned and on the second the jury returned in favor of the defendant, appellee. Judgment was rendered on the verdict of the jury and a writ of certiorari

was granted.

The record discloses that the note declared upon in this proceeding was signed by Herman Mateske and R. G. Mateske, and the signature "F. W. Mateske" also appears thereon. The note is dated October 17th, 1913, and was given to the Reddick State Bank. In the early part of November, 1913, it was purchased from the Reddick State Bank by the appellant Charles E. Palmer, and is endorsed "without recourse". The suit was instituted against appellee to the October Term, 1924, approximately eleven years after the date thereof. The case was first tried during the October Term, 1925. It was again tried during the May Term, 1926. The only witnesses introduced on the trial by appellant were Charles E. Palmer and Oscar L. Weiss, cashier of said bank. Palmer testified that he knew nothing about the signatures and that he purchased the note from the Reddick State Bank in the early part of November, 1913; that he first spoke to appellee about it after the death of Herman Mateske, who died in 1919; that on that occasion the appellee denied signing the instrument sued on; that Herman Mateske paid the interest for the first two years, and R. G. Mateske paid the interest thereon for the following two years; that there were two years interest unpaid at the time he first spoke to the appellee, and that he never asked him to pay the interest. Appellant also testified that after Herman Mateske's death in 1919, he attempted to collect the note from Herman's estate but was unsuccessful; that he did not know whether appellee signed it; that he did not see him sign it and that he does not know whether or not the signature "F. W. Mateske" is the signature of the appellee.

Oscar L. Weiss testified that the consideration ~~of~~ for the note was money loaned to R. G. Mateske; on the face of the note appears the signatures of Herman Mateske, R. G. Mateske and F. W. Mateske; the endorsement on the note is in my hand writing; ~~it is the endorsement on the note is in my hand writing; it is the~~

and recent disclosure that the note described upon in this
testimony was signed by Herman Matlack and R. G. Matlack, and the
signature "T. W. Matlack" also appears thereon. The note is dated
August 17th, 1918, and was given to the Hedrick State Bank. In
the early part of November, 1918, it was purchased from the
Hedrick State Bank by the appellant George L. Matlack, and he
retained "private interest". The note was deposited without
application to the October term, 1924, approximately eleven years
after the date thereof. The case was first tried during the
October term, 1923. It was again tried during the May term, 1928.
The appellant was introduced on the trial by appellant's counsel
George L. Matlack and Henry L. Wilson, assistant of said counsel. Wilson
testified that he knew nothing about the signature and that he
purchased the note from the Hedrick State Bank in the early part
of November, 1918; that he first spoke to appellant about it after
the death of Herman Matlack, who died in 1919; that on that occasion
the appellant denied signing the instrument and said that Herman
Matlack had the instrument for the first two years, and that
Matlack paid the interest thereon for the following two years;
that there were two years interest unpaid at the time he first
spoke to the appellant, and that he never asked him to pay the
interest. Appellant also testified that when Herman Matlack's
death in 1919, he attempted to collect the note from Herman's
estate but was unsuccessful; that he did not know where the
note was; that he did not see him since it and that he does not
know whether or not the signature "T. W. Matlack" is the sig-
nature of the appellant.
George L. Matlack testified that the consideration for the
note was money loaned to R. G. Matlack; on the face of the note
appears the signatures of Herman Matlack, R. G. Matlack and T. W.
Matlack; the endorsement on the note is in my hand writing; it
is a statement on the note that it is a loan and that it is the

endorsement of the Reddick State Bank; I placed the endorsement thereon when the note was sold to Charles E. Palmer, soon after it was made; it was before the note matured; the consideration for the note was money loaned, not actual cash but a credit to the account of R. G. Mateske, one of the signers. This note had been renewed several times; the date of the original loan was November 30th, 1910, renewed October 17th, 1911. The amount of the 1910 note was \$1,000 and the amount of the 1911 note was \$1,000. I have a personal recollection outside of any record as to who signed the 1911 note. It was Herman Mateske, R. G. Mateske and F. W. Mateske. I have a personal recollection independent of any record as to who signed the 1910 note. It was the same three who signed plaintiff's Exhibit 1, (plaintiff's exhibit 1 is the note in controversy). I recollect that the defendant Fred Mateske did some business at my bank in 1910. In the course of business I have frequently seen him sign his name. He has not done business at the bank recently--not since this note was put in suit. At times he had a checking account at our bank. I could not say how much of the time from 1910 to 1919 his name was on the book; it is yet. He had a checking account all of the time. He drew checks irregularly. He did other business at the bank. He borrowed money and deposited money on certificate. I could not exactly say how often I saw his signature on all these kinds of instruments. Quite a number of times. At times I saw him sign his name. From my observation of his signatures, and my experience in bank business, I am able to testify whether these, (referring to signatures on a number of exhibits), are his signatures. I could not say now if I saw him sign the note sued upon, it has been so long ago.

In addition to the testimony of Palmer and Weiss the appellant offered in evidence six exhibits, containing the signatures of appellee. These original exhibits are before the

endorsement of the Reddick State Bank; I placed the endorsement thereon when the note was sold to Charles E. Palmer, soon after it was made. It was before the note matured; the bank had paid the note was money loaned, not actual cash but a credit to the account of R. G. Matlock, one of the aliases. This note had been renewed several times; the date of the original loan was November 30th, 1910, renewed October 19th, 1911. The amount of the 1910 note was \$1,000 and the amount of the 1911 note was \$1,000. I have a personal recollection of my having signed the 1911 note. It was Herman Matlock, R. G. Matlock and T. W. Matlock. I have a personal recollection independent of any record as to who signed the 1910 note. It was the same three who signed the 1911 note. I recollect that the defendant had been in business at my bank in 1910. In the course of business I have frequently seen him sign his name. He has not done business at the bank recently--not since this note was put in suit. At times he had a checking account at our bank. I could not say how much of the time from 1910 to 1919 his name was on the book; it is just. He had a checking account all of the time. He drew checks irregularly. He did other business at the bank. He borrowed money and deposited money on certificates. I could not exactly say how often I saw his signature on all these kinds of instruments. Quite a number of times. At times I saw him sign his name. From my observation of his signatures, and my experience in bank business, I am able to testify whether these, referring to signatures on a number of exhibits, and his signatures. I could not say now if I saw him sign the note and upon it has been so long ago.

In addition to the testimony of Palmer and Wiles the appellant offered in evidence six exhibits, containing the signatures of appellees. These original exhibits are before the

court now for consideration, having been properly certified to this court, and are ~~here~~^{out} for inspection.

Appellee testified that he was a farmer and had lived 53 or 54 years near Reddick, Illinois, and was a brother of Herman Mateske and R. G. Mateske; that Palmer, the appellant, first showed him the note in question a few days after the death of his brother Herman in 1919; that he told appellant when first spoken to with reference to the note that he did not sign it and that he heard nothing of the note from that time until suit was started on it in 1924; that the signature on the note in question was not his signature and that he had never authorized anyone to affix his signature to the note; that he had bought Herman's farm in 1914, about the date of the note and was indebted to Herman at and after the time the note was due; that he ordinarily signed his name "Fred Mateske," or "Mateske" and that he does not use the initial "W" in his signature unless the initial is on the face of the instrument, in which case he uses the "W" in endorsing the instrument. He denied that he had ever signed a note for \$1,000 with Herman Mateske and R. G. Mateske payable to the Reddick State Bank in 1910, 1911 or 1912; that he did not think that he had ever signed a note with his two brothers; that he had no idea who signed his name to the note in question. Appellee identified his signature on five exhibits he introduced in evidence. He testified that his eyesight was not good and that he ordinarily wore glasses but that he had forgotten to bring his glasses on the day of the trial. He was asked to identify certain exhibits in the presence of the jury and identified some as his and denied others. He then obtained a pair of glasses and upon examining the exhibits he reversed his answers and identified two of the exhibits on which his signature appeared, and which he had formerly said were not his signatures. He testified that he had done business at the Reddick State Bank and did business with the bank until about 1918.

The five exhibits, introduced by the appellee on which his signatures appear, are before the court for consideration.

L. L. Henry, cashier of the Farmer's Bank at Buckingham, Illinois, testified that appellee had done business at his bank since 1919 and that he was familiar with defendant's signature from having seen it on checks and notes; that in his opinion the signature on the note in question was not the signature of the defendant; that from his observation appellee does not sign his name with the initials alone; that the capital "F" on the note in question was different from the capital "F" on the other four exhibits admitted to be genuine; that he could see a close similiarity between the purported signatures of R. G. Mateske and F. W. Mateske on the note in question.

G. B. Aldrick, cashier of the Farmer's State Bank at Cabery, testified that he was familiar with the signature of appellee from bank transactions he had with him and that in his opinion the signature on the note in question was not the signature of appellee; that he had never seen appellee sign his name "F. W. Mateska," and that he signed his name "Fred" and sometimes used the "W" with the "Fred."

Dr. W. M. Miller testified that he had known appellee for about 30 years and was his family physician for 20 or 30 years, and that appellee had, at different times, borrowed money from the witness on notes; that in his opinion the signature on the note in question was not the signature of appellee and that appellee had always signed his name "Fred Mateska" in all the time he had seen him sign his name; that he had never seen him sign his name with the initials "F. W. Mateska."

Appellee, on being re-called testified that he spelled his name "Mateska," because when his father received the deed to his farm the name "Mateske" was spelled "Mateska," and that after that he used the "a" and used "Mateska" only in case it was

The five exhibits, introduced by the appellee on which

the appellee rested his case, were as follows:

1. A letter, dated at Birmingham, Alabama, January 1, 1900,

testified that appellee had done business at his bank

since 1893 and that he was familiar with defendant's signature

and that he was familiar with the note in question; that in his opinion the

signature on the note in question was not the signature of the

defendant; that from his observation appellee does not know the

man who signed the note in question; that the capital "T" on the note in

question was different from the capital "T" on the other four

notes which were introduced by the appellee; that he could not recall

the signature between the purported signature of R. G. Madsen

and the signature on the note in question.

2. A letter, dated at Birmingham, Alabama, January 1, 1900,

testified that he was familiar with the signature of

appellee from bank transactions he had with him and that in his

opinion the signature on the note in question was not the

signature of appellee; that he had never seen appellee sign the

note in question; that he could not recall the signature of

appellee used the "W" with the "T" on it.

3. A letter, dated at Birmingham, Alabama, January 1, 1900,

for about 30 years and was a family physician for 20 or 30

years; that he was familiar with the signature of appellee and

from the witness on notes; that in his opinion the signature

on the note in question was not the signature of appellee and

that appellee had always signed his name "R. G. Madsen" in all

the time he had seen him sign his name; that he had never seen

him sign his name with the capital "T" on the "W".

Appellee, on being re-called testified that he recalled

his name "Madsen", because when his father received the deed to

the land the name "Madsen" was spelled "Madsen", and that after

that he used the "a" and used "Madsen" only in cases it was

necessary to make the spelling correspond with the spelling on the note, check or instrument of that sort.

This is substantially all of the evidence offered on the trial of the case. Some objections were made to certain rulings of the court on the admissibility of testimony but these objections are not referred to in the briefs and argument. No question is made as to rulings on instructions. The genuineness of the signature in question was for the jury to determine. The jury saw and heard the witnesses. The note declared upon was before them and the various exhibits offered by both appellant and appellee to which we have already referred were before the jury and they had an opportunity to examine the signatures thereon. We have examined the signatures on the respective exhibits.

We have set out the testimony at length bearing upon the controlling issues and the conflicts in the testimony are so obvious that no discussion of the evidence is required. As to the verdict of a jury where the evidence is conflicting, it was said in the case of Illinois Central R. R. Co. vs Gillis, 68 Ill. 317-319; "If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony." To the same effect are the following cases: Bradley vs Palmer, 193 Ill. 15,89; Cavney vs Sheedy, 295 Ill. 78,83; Balckhurst vs James, 304 Ill. 586,592.

It has also been held that a reviewing court should not set aside a verdict of a jury merely because there may be a doubt of the correctness of the verdict. Illinois Central

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R. R. Co. vs Cowles, 32 Ill. 116, 121; De Forest vs Oder, 42 Ill. 500, 501. To the same effect is People vs Eagen, 241 Ill. App. 189, 196-197.

In view of the conflict in the testimony in this cause we are not prepared to say that the verdict of the jury is manifestly against the weight of the testimony.

We are of the opinion that the judgment of the Circuit Court of Kankakee County should be affirmed, which is accordingly done.

Judgment affirmed.

It is to be noted that the same date, 1912, is given in both cases, and that the same office is given in both cases.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois. and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

6789
Fourth October
Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

246 I.A. 630²

BE IT REMEMBERED, that afterwards, to-wit: On

OCT 25 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

October Term, A. D., 1926

CUMMINGS AND EMMERSON,
(An Illinois corporation),

Appellants,

vs.

ESTELLA L. STROUD, Administratrix
of the Estate of WALTER B.
STROUD, deceased,

Appellee.

Appeal from the City Court
of the City of
Kewanee, Illinois.

OPINION by BOGGS, J.

An action on the case was instituted by appellant in the Circuit Court of Kewanee County against appellee's intestate Walter B. Stroud to recover on four promissory notes of Two Hundred Dollars each, given as part payment on a machine for grinding automobile cylinders. The declaration was in the usual form, and was based on said promissory notes. To said declaration, appellee filed five pleas.

The first plea alleged that on July 24, 1922 appellant sold Stroud "a certain B. L. Smith automobile cylinder grinding machine * * * at the price of \$1,600.00, and then and there the plaintiff warranted the said cylinder grinding machine to be fit for the purpose of grinding automobile cylinders, and that said cylinder ~~gridin~~ grinding machine would remove and grind out of an automobile 30/1000 of an inch * * * in fifteen minutes, or one complete automobile cylinder block in one hour, and that said machine would grind the cylinders smoothly and do good and satisfactory work, * * * and could be operated by any unskilled person." It is further averred that said machine "was not fit for the purpose of grinding automobile cylinders" and that it would not grind out 30/1000 of an

Page 1

EXHIBIT NO. 1

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inch from a cylinder in fifteen minutes or a complete block in one hour, and that the consideration for the giving of said notes had wholly failed. It is further averred that Stroud "upon using said grinding machine and finding it of no use or value to him for the reasons above stated, and after having paid to the plaintiff the sum of Eight Hundred Dollars as aforesaid, notified the plaintiff of the above stated facts and requested the plaintiff to take back said machine and cancel said notes."

The second and third special pleas were in substance the same as the first. The fourth plea as amended was a plea of set off. In addition to setting forth the sale of said machine, purchase price, warranties of the same, and its failure to fulfill said warranty, etc., said plea further averred that appellant "promised the defendant that in case said machine was not as warranted, * * * the plaintiff would take back said machine and repay to the defendant any and all parts of the said purchase price paid by the defendant to the plaintiff, and cancel any notes that the defendant might give to secure said purchase price"; that he, appellee, "is now and has at all times been ready to return to plaintiff said machine, and that he now holds the same subject to the plaintiff's orders." The fifth plea is a plea of the common counts, in set off.

To said special pleas appellant filed replications denying the warranty of said machine, the agreement to take it back if not as warranted, and averring that said machine was reasonably fit to do the work for which it was manufactured. A trial was had, resulting in a verdict and judgment in favor of appellee in the sum of \$400. To reverse said judgment, this appeal is prosecuted.

The record discloses that on June 6, 1922, appellee gave to appellant the following order:

"Order No. .

Date 6/26/22

Ship to Walter B. Stroud,
at Kewanee, Illinois.

How ship--Freight

When--2 weeks. to arrive.

1 Schmidt Grinder \$1,600.

F. O. B. Factory.

One hundred dollars cash receipt of which is hereby acknowledged. Grinder to be shipped draft attached for \$300, balance of \$1,200 in 6 equal notes of \$200 each payable each succeeding 30 days from date of signing, drawing 7% interest and secured by chattel mortgage against Grinder, settlement through First National Bank of Kewanee.

W. B. STROUD."

Stroud paid said draft of \$300 on receipt of the grinder, and on December 30th, 1922, he paid the two notes falling due in 30 and 60 days, respectively, but paid nothing further thereon.

It is first contended by counsel for appellant for a reversal of this case that the court erred in refusing to direct a verdict in its favor, on its motions made at the close of appellee's evidence and again at the close of all the evidence. It is the contention of counsel for appellant that the order above set forth amounted to a written contract, and that the same could not be varied or added to by oral testimony.

The rule that a written contract of sale avoids a prior verbal warranty has no application where the writing amounts merely to an order for goods. Federal Rubber Mfg. Co. v. Flow City Garage, 204 App. 126; Offenberg v. Arrow Distilleries Co., 222 App. 512; Cyc., vol. 35, p. 380. In Offenberg v. Arrow Distilleries Co., supra, this court in discussing this question at page 515 said:

"Evidence of a parol contemporaneous agreement connected with a sale of personalty is admissible, although the sale is evidenced by a written instrument, provided such agreement does not tend to vary or contradict the terms of the writing itself."

22 Cor. Jur. ¶ 1257, sec. 1677.

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We are of the opinion and hold that this order did not amount to a written contract so as to bar oral testimony of an express contract if one were made.

It is further contended by counsel for appellant that, even though it be held that the order in question does not amount to a written contract so as to avoid oral testimony, that the evidence on the part of appellee, if taken as true, together with all the reasonable inferences to be drawn therefrom, does not fairly tend to prove the allegations of any of appellee's pleas.

The theory of the first, second and third pleas is that there was a warranty as set forth in said pleas; that the machine failed to meet the warranty, and that it was agreed that in the event of a failure of the machine to fulfill the warranty, Stroud should have the right to return the same and have his notes cancelled and his money refunded. The theory of the fourth plea as amended is that there was a warranty and a breach of the same, and that, in the event of such breach, Stroud should have the right to return said machine and have his notes cancelled and his payments refunded. Stroud did not file a plea of the general issue. The burden therefore was on him to prove the allegations of his pleas or some one or more of them, and he was given the right to open and close in said cause.

An examination of the record discloses that there was no evidence proving or tending to prove the allegations of the first, second, third or fourth pleas, to the effect that Stroud should have the right to return the machine and have his notes cancelled.

Stroud testified that at the time he purchased said machine, Mr. Alexander, one of appellant's salesmen, said to him: "You can grind out one of those holes in a Ford block in fifteen minutes, or grind out a whole block in an hour." * * * He said it would remove thirty-one one-thousandths of an inch out of a cylinder in fifteen minutes, and do smooth and satisfactory work." He also

of the 10th of the month and this was the first time

known to a witness (witness) as to the first time

known to a witness (witness) as to the first time

It is further stated by counsel for appellant that

even though it be said that the state in question has not

as a matter of fact as an individual testimony, that the only

known on the part of appellant, it seems to me, together with all

the reasonable inference to be drawn therefrom, does not fairly

lead to any of the allegations of any of appellant's pleas.

The theory of the first, second and third pleas is that

there was a conspiracy on the part of appellant, that the

failed to meet the requirements, and that it was agreed that in the

event of a failure of the machine to fulfill the warranty, the

would have the right to return the same and have his money re-

turned and his money returned. The theory of the fourth plea is

that in that event was a conspiracy and a breach of the same, and

that, in the event of such breach, the same would have the right to

return the same machine and have his money returned and his

returned. It is also stated that in the fourth plea, the

theory therefore was on the part of appellant to prove the

in that case it was of such, and he was given the right to return

pleas in said case.

An examination of the record discloses that there was no

testimony given as to the right to return the same machine

return, that of course, as the right to return the same

testimony given as to the right to return the same machine

It is also stated that at the time of the return of the machine

the, therefore, one of appellant's witnesses, who is dead

and that was one of the witnesses in the case

therefore, on the part of appellant, it is also stated

that the same machine was returned to the state of the

in the case, and it is also stated that the same

testified that a Mr. Fields, another salesman who was present, stated: "Any differences that come up with the machine, all you have to do is to let our salesman know about it, and we will take care of it." He said that I could operate it. He said an unskilled man can operate the machine."

Stroud further testified, over the objection of appellant, that the machine was not adapted "to the purpose of grinding automobile cylinders"; that he made complaint to Mr. Alexander around October, 1922, and told him "that the machine wasn't coming up to what they claimed, * * * that it wasn't grinding out cylinders as smooth as it ought to, that it was taking too long to do it." He also testified that in the early part of 1923, he told Mr. Garnett, a salesman for appellant, "that the machine wasn't proving satisfactory," and that Garnett said he would take it up with the company; that he, Stroud, went to Peoria in February, 1924, to see the company, and that they advised him to try the machine out again, and that he did so try it out in March, 1924. Counsel for appellee, referring to said machine, inquired of Stroud:

"Q. Had it any value as an automobile grinding machine?" Counsel for appellant objected to the question because "sufficient foundation has not been laid, or that he is competent to testify on that particular subject." The objection was overruled and Stroud answered:

"A. Worthless."

Appellant then moved that the answer be stricken as the conclusion of the witness, but the motion was denied and the answer allowed to stand.

Stroud was corroborated in his testimony with regard to the purported warranty of said machine by two witnesses, who stated that they were present at the time the conversation between appellee and the parties selling the machine occurred. However, there was no testimony by either Stroud himself ^{or} ~~and~~ by any of his witnesses to the effect that there was any agreement on the part of the salesman

of appellant that the machine in question would be taken back and the notes cancelled, in the event that the machine did not fulfill the alleged warranty. Neither was any evidence offered, tending to prove a return or a tender back to appellant of the machine in question.

Counsel for appellee practically concede the truth of this statement. On page 15 of appellee's brief and argument it is stated: "The case was tried on the theory that the defendant had the right to retain the machine and to set off and recoup his damages when sued."

Primarily, a party's theory of a case is disclosed by his pleadings, and in order to recover, if a plaintiff, or to defeat an action, if a defendant, the proof in support of the declaration in the one case, or of the affirmative pleas in the other, must coincide with said pleadings and sustain the same. This, appellee's evidence did not do. C., R. I. & P. Rr. Co. v. Todd, 91 Ill. 70-73; Ross v. Shanley, 185 Ill. 390-393; Gammon v. Havelock, 40 App. 268-269.

The evidence offered by Stroud in support of his pleas was in substance as above set forth and this evidence, taken as true, together with all the reasonable inferences to be drawn therefrom, does not fairly tend to prove the whole or any part of the pleas filed by appellee herein. This being true, the court erred in failing to direct a verdict at the close of appellee's evidence. Kinser v. Calumet Fire Clay Co., 165 Ill. 505-509; Angus v. Chicago Trust & Savings Bank, 170 Ill. 293-302; Marshall v. Grosse Clothing Co., 184 Ill. 421-425; Lanum v. Harrington, 267 Ill. 57-65.

While we are holding that the court should have directed a verdict at the close of appellee's evidence, it might also be observed that in rebuttal appellant offered a letter written by Stroud under date of November 7, 1924, being nearly two years and a half after said sale and nearly two years after said payments were made, and long after the times at which appellee claims to have made complaint with reference to said machine. This letter clearly discloses that appellee was not then claiming that there

had been any warranty in reference to said machine, nor any agreement, on failure of such warranty, that appellant would take back said machine and cancel said notes, but was to the effect that the salesman had stated to Stroud that the operation of said machine would be profitable, and that it would pay for itself, and that it had failed to do so.

As this case must be reversed and remanded, there are certain points raised on the record which we probably should pass on. It is contended by counsel for appellant that there is not sufficient proof in the record that its salesman who made the sale of the machine in question had the authority to make the contract of warranty alleged in said pleas.

Unless his authority is restricted and notice thereof given to the party interested any warranty of an article sold, made, by a general sales agent would be binding on his principal. *Elkhart Carriage Co. v. Eaton*, 163 App. 552-554. In *Cochran v. Chitwood, et al*, 59 Ill. 53, the court at Page 54 in discussing a question of this character says: "The agent was acting under a general authority, and we must regard the acts of the agent as the acts of the principal, and under the circumstances proven, hold, that the plaintiff is bound by any warranty that was made by his agent, in making the sale." Citing *Markle v. Haskins*, 27 Ill. 382.

Inasmuch as there was no written contract as such, but only an order for the goods in question, and there being no notice to appellee of a restricted agency or authority, any express warranty of the quality of the goods sold, made by such agent or agents, would be binding on appellant.

It is further seriously contended by counsel for appellant that there is no sufficient proof in the record, even conceding that the salesman of appellant were authorized to warrant the grinder in question, to show that there was in fact a warranty.

The substance of appellee's testimony is to the effect that the salesman stated to him that he could grind out a cylinder in a

certain length of time and a complete block in a certain length of time, and that the machine would do smooth work, etc. Without passing on whether such statements amount to a warranty or not, the evidence discloses that appellee did not rely on the same. Before purchasing the grinder Stroud went to Peoria and saw a similar machine in operation. In this connection he testified: "They took me out to see the machine. They started it up and I saw it work. That was before I bought my machine. After seeing that machine I bought my machine." He testified that he stated to the salesman at the time they were to see him: "Then I made the remark, 'Yes, when you fellows sell the machine that will be the last time I will ever see you.' Mr. Fields said, 'You can take up any differences with our people.' Mr. Fields made the statement 'Any differences that come up with the machine all you have to do is to let our salesman know about it, and we will take care of it.'" After stating that the salesman had said to him that "any unskilled workman could operate the machine," Stroud also testified: "I knew it as a fact that any man before he can operate any kind of a machine to grind a cylinder block must have some knowledge and skill of machinery, and some knowledge and skill along that line. I knew at the time the representations were made to me that a person would have to have some knowledge of machinery."

In *Adams v. Johnson*, 15 Ill. 345, the court at page 346, in discussing the question of warranties, said:

"Should every expression of opinion upon the sale of an article be held to create a warranty, proof would not be wanting in almost every instance of the sale of chattels to establish a warranty; for but few articles are sold where the vendor does not praise his wares, and such encomiums are generally understood by purchasers as they are intended by the sellers. Where a warranty is intended, something more than this is done, and the intention of the parties is clearly manifest to that effect."

And in *Roberts v. Applegate*, 153 Ill. 210, the court said, quoting from *Kenner V. Harding*, 85 Ill. 264:

"In determining whether there was in fact a warranty, the decisive test is, whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected, also, to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter, not. (Benjamin on Sales, 454)."

In *Fuchs & Lang Co. v. Kittredge*, 242 Ill. 88, the court at page 95 said:

"The false representation which can be made the basis of an action or the rescission of a contract, where there is no relation of confidence, must be of a material fact. Matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against. Exaggeration in the commendation of articles offered for sale will not avoid a contract."

We have quoted the substance of appellee's testimony with reference to what was said at the time the machine in question was sold to him, and are clearly of the opinion and hold that the language used did not amount to a warranty.

It is ~~also~~ contended by appellant that, inasmuch as the machine ordered was ordered by its trade name, there would therefore be no implied warranty that it was reasonably suited for the purposes for which it was sold. It is not necessary for us to go into this proposition, as appellee is relying alone on an express contract of warranty.

It is also contended by appellant that the court erred in giving appellee's third instruction. This instruction is based on the theory that there was evidence in the record tending to show that appellee had tendered back the machine in question on account of its failing to meet the alleged warranty. There was no evidence in the record to support this contention, and the court therefore erred in giving said instruction.

doi:10.1017/S002229240000229

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Other errors were assigned on the record, but it will not be necessary for us to pass upon the same.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and Remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ^{fourth} ~~fifth~~ day of ^{October} ~~April~~, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

246 I.A. 630³

BE IT REMEMBERED, that afterwards, to-wit: On

OCT 25 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The

APPELLATE COURT OF ILLINOIS,

Second District.

April Term, A. D., 1927.

FREDERICK E. TRIEBEL,

Appellee,

vs.

ESTATE OF ELLEN MARION CLISBE
DON MEYER, Deceased, GEORGE
R. MacCLYMENT, Executor,
Appellant.

Appeal from
Circuit Court of
Peoria County.

BOGGS, J.

Ellen Clisbe Don Meyer, a resident of Peoria, being desirous of perpetuating the memory of her deceased husband, on May 25, 1912 entered into a contract with appellee, a sculptor of New York, for the designing and construction of a shrine.

Article One of said contract provides: "The Sculptor shall and will provide all materials and perform all work for sculptoring and erecting a shrine for Mrs. Ellen Clisbe Don Meyer, in memory of her deceased husband, to be erected in a Memorial Temple willed by her, to be erected in Peoria, Illinois, from bronze and marble, consisting principally of the portrait bust of her late husband and one of herself, together with a cinerary urn."

Article Two provides that said work shall be completed within Five Years. Article Three is to the effect that appellee is to be paid \$10,000 for such work, \$2,000 to be paid on October 1, 1912, and \$2,000 on the first day of each October thereafter until said amount has been paid.

Article Seven provides: "If, at the time when the Sculptor has his work ready to set in place, he is prevented from so doing

APPEALS COURT OF ILLINOIS
Second Division

April Term, A. D., 1917.

Appeal From
Circuit Court of
Jesse County.

WILLIAM C. FINKEL,
Appellee,
vs.
ESTATE OF ELLEN CLIPSE CLIBBE
FOR HER, DECEASED, GEORGE
F. WOODHULL, Executor,
Appellant.

WILLIAM C. FINKEL,

Ellen Clipse Don Meyer, a resident of Texas, being
deceased at the time of her death, having, on
May 25, 1912, entered into a contract with appellant, a sculptor
of New York, for the execution and construction of a statue.
Article One of said contract provides: "The Sculptor
shall and will provide all materials and perform all work for
sculpturing and erecting a statue for Mrs. Ellen Clipse Don
Meyer, in memory of her deceased husband, to be erected in a
burial place owned by her, to be erected in Texas, Illinois,
this contract and statute, construction principle of the contract
part of her late husband and one of herself, together with a
statue of her."

Article Two provides that said work shall be completed
within five years. Article Three is to the effect that appellee
is to be paid \$10,000 for such work, \$2,000 to be paid on October
1, 1912, and \$2,000 on the first day of each October thereafter
until said amount has been paid.
Article Seven provides: "If, at the time when the Sculptor
has his work ready to set in place, he is prevented from so doing

because the Owner has failed to provide the site or place, then the final payment, less the cost of setting the work in place shall become due and payable."

Mrs. Don Meyer had an only child, a daughter, and being desirous that a bas-relief of this daughter be made a part of said shrine, on July 19, 1913 signed the following instrument:

"I, Ellen Clizbe Don Meyer have this day accepted the three plaster models made by Prof. Frederick E. Triebel. The Models consist of a bust of my husband, Isaac W. Don Meyer, a bust of myself, and a bas-relief of my daughter, Rose Marie Don Meyer, I herein agree to pay (\$500) five hundred dollars in 1916 for the bas-relief in addition to the \$10,000 already subscribed. The two busts and bas-relief are to be made of statuary marble and kept by Prof. Triebel until Temple is ready."

Thereafter, on October 29, 1915, Mrs. Don Meyer entered into a third contract with appellee, as follows:

"I, Mrs. Ellen Marion Clizbe Don Meyer this day I have approved the model as shown me in the Studio of Prof. F. E. Triebel and photograph of the sketch model being herewith annexed showing the dimensions. I further obligate myself or executors to pay the sum of (\$5,000) Five Thousand Dollars extra for the marble statue of Silence and two busts one of myself and the other of my husband also to be reproduced in marble. Payments will be made as follows, on the 15th day of March 1917, the sum of Two Thousand Five Hundred Dollars (\$2,500) and on the 15th day of March 1918, the final payment of (\$2,500) Two Thousand Five Hundred Dollars.

"In all there are to be four marble busts of which two are to be colored in antique. A balance of Five hundred Dollars (\$500.00) due me in March 15th, 1916, is to be paid on March 15, 1919.

because the Owner has failed to provide the site or place, then the final payment, less the cost of settling the work in place shall become due and payable."

Mrs. Don Meyer had an only child, a daughter, and being satisfied that a fee-receipt of this daughter be made a part of the following instrument:

"I, Ellen Olafson Don Meyer have this day accepted the

same plaster models made by Fred. Wilhelm E. Triebel. The

models consist of a bust of my husband, Isaac W. Don Meyer, a

bust of myself, and a fee-receipt of my daughter, Rose Marie

Don Meyer, I have agreed to pay (\$1000) five hundred dollars

for the fee-receipt in addition to the \$10,000 already paid-

accepted. The two busts and fee-receipt are to be made of marble.

Marble and kept by Fred. Wilhelm E. Triebel until he is ready."

Thereafter, on October 22, 1918, Mrs. Don Meyer entered

into a third contract with specified, as follows:

"I, Mrs. Ellen Marion Olafson Don Meyer this day I have

approved the model as shown me in the sketch of Fred. W. E.

Triebel and photograph of the statue model being herewith a

copy of the same. I have agreed to pay (\$2,000) two thousand

dollars for the fee-receipt of the same and the

marble statue of Isaac and two busts one of myself and one

other of my husband also to be reproduced in marble. Thereafter

will be made as follows, on the 15th day of March 1919, the sum

of two thousand five hundred dollars (\$2,500) and on the 15th

day of March 1919, the final payment of (\$2,500) two thousand

five hundred dollars.

"In all there are to be four marble busts of which two

are to be colored in antique. A balance of five hundred dollars

(\$500.00) are to be paid on March 15, 1919, and on March 15,

1919.

PROF. F. E. TRIEBEL

ELLEN MARION CLIZBE DON MEYER

Witnessed)
October 29th, (
1915)

BEATRICE A. TRIEBEL

CURTIS KOHR DON MEYER."

Mrs. Don Meyer died testate Sept. 27th, 1916, W. W.

Hammond who was first appointed executor and trustee died and appellant, thereafter qualified as his successor. Prior to her death Mrs. Don Meyer paid appellee \$8,000 on said work. After signing the contract of October 29th Mrs. Don Meyer on consultation with her attorney, wrote appellee among other things:

"At the time I signed the paper in your house October 29th, I did not understand it. I supposed of course it was necessary for me to sign it because you said so, and I had no time to think the matter over. * * *

"Under my original contract of May 25th, 1912, you were to prepare to be erected in Peoria a shrine of bronze and marble consisting principally of portrait busts of Mr. Don Meyer and myself, together with a cinerary urn.

"Subsequently it was verbally agreed between us that the bas-relief of my daughter should appear upon the shrine, for which I agreed to pay you an extra \$500. Shortly after that you submitted to me sketch of the work which you proposed to do, and this I kept as a detail of the contract, inasmuch as the contract itself was very general in its language. I find this sketch includes the statue of Silence.

"You proceeded under this contract to make the busts of Mr. Don Meyer and myself and the statue of Silence, and the bas-relief, and sent for me to view them, and I went down to see them last month. After showing them to me you drew up this purported contract, which I understood to have reference to my inspection and approval of your work, and so far as it states that I approve the plaster models and the bust of Mr. Don Meyer, it correctly states

our agreement. But so far as it purports to state that I agreed to pay you \$5000 more for the marble statue of Silence and two busts of myself and one of Mr. Don Meyer, it is entirely incorrect. You were already under obligation under your original contract to make these things for \$10,500.00, and there is no consideration for my increasing that amount, and I disavow the contract of October 29th in so far as it purports to bind me to pay an additional \$5000. * * *

"It is perfectly evident from your letter of November 16th that you so understood the matter, because you had designed the statue of Silence before you had me sign this article of October 29th.

"I do not expect to make you any further payments than those called for by the contract of May 25th, 1912, and the \$500 subsequently added verbally, and if you are going to make me trouble about this matter I shall hold all payments on the original contract until our differences are adjusted.

"Very respectfully,

"ELLEN CLIZBE DON MEYER."

On December 2, 1915 appellee wrote to Mrs. Don Meyer in reply to the above letter stating among other things:

If you will recall the circumstances of the contract executed by you on October 29th, you will remember that it was first written by me at your dictation and read and corrected by you and written over by your nephew.

"Every point covered by the papers was carefully considered by you in regard to the same, and I cannot understand how any misunderstanding on the subject can be claimed at this time. Your letter again speaks of the four marble busts and as this does not enter into the matter in any way, I would like to state again that our agreements covered only the two marble busts which are to be on the monument, and that the two finished busts I have given to you and make no charge therefor, the reason being that I, myself,

any agreement. But so far as it purports to state that I agreed

to pay five \$5000 more for the certain shares of common stock and

shares of myself and one of Mr. Don Meyer, it is entirely incorrect.

The more clearly stated obligation which your witness admitted to

make good during the year 1912, and there is no consideration

of any increasing that amount, and I disavow the contract of

October 29th in so far as it purports to bind me to pay an

additional \$5000. * * *

"It is extremely curious that your witness at that time

did not say so in the report of the matter, because you had admitted

the status of silence before you had no sign this article of

October 29th.

"I do not expect to have any further business with

those called for by the contract of May 25th, 1912, and the \$500

unpaid amount of that contract, and if you are going to make me

responsible about this matter I shall hold you responsible on the contrary.

Respectfully, your witness.

"Very respectfully,

"WILLIAM GILMAN DON MEYER."

On December 2, 1912 appellee wrote to Mrs. Don Meyer in

reply to the letter of the appellee dated May 25th, 1912.

"If you will recall the circumstances of the contract

executed by you on October 29th, you will remember that it was

first written by me at your dictation and read and corrected by

you and written over by your nephew.

"Every point covered by the papers was carefully considered

by you in regard to the same, and I cannot understand how any

misunderstanding on the subject can be claimed at this time. Your

letter again speaks of the four marble busts and as this has not

yet been the matter in any way, I would like to state again that

our agreements covered only the two marble busts which are to be

on the monument, and that the two finished busts I have given to

you and make no charge therefor, the reason being that I, myself,

was dissatisfied with the quality of the marble as the same developed upon the busts being completed. The question of the busts can therefore be eliminated.

"In your letter you disavow your intention to pay for the statue of Silence and you call upon me to acknowledge that I am to finish the statue of Silence, a bust of yourself and one of your husband and the bas relief for the original sum of \$10,500. I can make no such acknowledgment. The original design made under the contract and the price of which was to be \$10,000 was satisfactory as originally designed, to consist principally of the urn and the two busts. When you ordered the bas relief of your daughter to be included, it spoiled the entire effect of the original design, from an artistic point of view and necessitated making an entirely new design, as the original design was not made to include the bas relief.

"I explained to you that there would be an extra expense in connection therewith. I made the new design, you accepted the same and we agreed on the price to be paid for the additional statue included.

"Because/^{of}the time spent by me and the great effort I put into the work, the work I still have to do and the expense that I will still be put to for the completion of the shrine, there is no profit for me on this transaction. I must insist upon standing on the contracts as shown by your original contract, your written order for the bas relief and your agreement of October 29th, 1915."

Appellee filed a claim in the probate court of Peoria County on May 4, 1917, setting forth that there was a ~~balance~~ balance owing on said contracts of \$7,500 with interest, etc. An affidavit was caused to be filed by the executor, denying the execution by Mrs. Don Meyer of the contract of October 29, 1915. On the trial in County Court said claim was allowed. On appeal to the Circuit Court said cause was heard without a jury, and said claim was allowed in the amount of \$10,215.31, being for principal of \$7,500 with interest accrued thereon to the date of the

the illustration of the design of the statue of the same artist
and the statue being completed. The question of the statue
was later to be eliminated.

"In your letter you discuss your intention to pay for the
statue of silence and you call upon me to acknowledge that I am
to finish the statue of silence, a bust of yourself and one of
your nephew and the bust relief for the original sum of \$10,000.
I am not to make any acknowledgment. The original design made under
the contract and the price of which was to be \$10,000 was satis-
fied by an originally designed, to consist principally of the sum
and the two busts. When you ordered the bust relief of your nephew
to be included, it spoiled the entire effect of the original
design, from an artistic point of view and necessitated making
an entirely new design, as the original design was not made to
include the bust relief.

"I explained to you that there would be an extra expense
in connection with the statue. I told you that the statue was
not to be made on the price to be paid for the additional
statue included.

"Because the time spent by me and the great effort I put
into the work, the work I still have to do and the expense that
I will be put to for the completion of the statue, there is
no profit for me on this transaction. I must have been standing
on the contract as shown by your original contract, your written
order for the bust relief and your agreement of October 23rd, 1915.
Appellee filed a claim in the probate court of Boone
County on May 4, 1917, setting forth that there was a balance
balance owing on said contract of \$7,800 with interest, etc.
An affidavit was sworn to be filed by the executor, showing the
execution by Mrs. Ben Meyer of the contract of October 23, 1915.
On the trial in Boone County said claim was allowed. On appeal to
the Circuit Court said claim was heard without a jury, and said
claim was allowed in the amount of \$10,215.21, being the principal
of \$7,800 with interest thereon to the date of the date of the

rendition of said judgment, being November 9, 1926. To reverse said judgment, this appeal is prosecuted.

It is first contended by appellant for a reversal of said judgment that the claim filed by appellee was not properly verified. So far as the record discloses, this objection is made for the first time in this Court. Appellant is therefore not in a position to urge its consideration here. Hartford Life Ins. Co. v. Sherman, 223 Ill. 329-335; People v. Harrison, 225 Ill. 540-545; Place v. Tri-State Inv. Co., 212 App. 524-529; Burroughs v. Donner, 282 Ill. 299-305. Without reference, however, to the fact that the objection to the verification of said claim was not urged in the trial court, the objection is not well taken. The statute in reference to the filing of claims against an estate does not require that the same be verified. Sec. 60, chap. 3, Cahill's Revised Statutes; Howe v. Brown, 287 Ill. 532-539.

It is also insisted that appellee does not in his claim allege performance. The claim sets forth the alleged contracts and the amount due thereon, and states that "affiant is ready and willing and here offers to produce before the court, upon request, all of said contracts and ample proof to sustain his said claim and account." This is sufficient. People v. Lefens, 269 Ill. 472-477; Clay v. Pierce, 114 App. 589-597.

It is also insisted by appellant that, without reference to the merits of this case, the proof of performance by appellee under said contracts has not been made, and that he is therefore not entitled to recover.

Article Seven of the original contract provides: "If at the time when the Sculptor has his work ready to set in place, he is prevented from so doing because the Owner has failed to provide the site or place, then the final payment, less the cost of setting the work in place, shall become due and payable."

The evidence in the record discloses that the work has

reversal of said judgment, being November 9, 1928. To reverse said judgment, this appeal is prosecuted.

It is first contended by appellant for a reversal of said judgment that the claim filed by appellee was not properly verified.

As to the verification, appellant is in error in his position. Appellant is therefore not in a position to show the verification is not proper.

People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

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People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545; People v. Harrison, 223 Ill. 540-545.

been completed, except the matter of the transporting of the shrine or memorial from New York and installing it in the temple to be erected under the provisions of the will of Mrs. Don Meyer. The expense of such transportation and installation was stipulated on the trial of said cause to be \$500.00.

Counsel for appellant practically concedes that this is the state of the record. After having gone into the matter of the different contracts executed by Mrs. Don Meyer, their construction, etc., counsel at page 11 of their brief and argument state: "Therefore this issue is narrowed down to the proposition as to whether or not appellee was legally bound to include the statue of 'Silence' in this memorial under the original contract, Claimant's Exhibit 1. If he is bound under the original contract, Claimant's Exhibit 1, and under his letter of February 4, 1915, then there was no consideration for the alleged contract (dated October 29, 1915), and appellee is entitled to nothing in this case."

That Mrs. Don Meyer fully understood the matters and things set forth in the contract of October 29, 1915, and that no advantage was taken of her to procure its execution is fully borne out by the evidence. The original bill of exceptions was, by agreement of the parties, made a part of the record. The contract of October 29, 1915 is before us for examination. It clearly appears that the body of said contract is in the handwriting of Curtis Kohr Don Meyer, who signed as a witness thereto. Curtis Kohr Don Meyer the record discloses was a nephew of Mrs. Don Meyer's husband. If, then, Mrs. Don Meyer was fully advised with reference to what she was signing, and no advantage was taken of her to procure her signature, then the only question remaining is as to whether or not there was a consideration for the execution of said contract and the promise on her part to pay the additional sum of \$5,000.

The record discloses that quite an extensive correspondence was carried on between Mrs. Don Meyer and appellee after the execution of the original contract and before the signing of the

contract of October 29, 1915, and several visits were made by Mrs. Don Meyer to appellee's studio in New York. During one or more of such visits the record discloses that appellee stated to Mrs. Don Meyer that to work in the bas relief of the daughter and make of the shrine an artistic piece of work would involve a greater cost, and that Mrs. Don Meyer stated that that didn't matter; that she did not care as to what the shrine cost her.

Marion Aldrich, a witness on behalf of appellee, testified that Mrs. Don Meyer at appellee's home in New York was discussing with her the matter of the shrine being designed and constructed by appellee, that * * * "She showed me then the sketches and she said 'How do you like this?' I said it was very good, but she said 'I want something more elaborate.' * * * Mrs. Don Meyer showed me the sketch marked Plaintiff's Exhibit A. She said that was the first sketch. * * * She said that was too plain, she wanted to make it more imposing, something that would show more, * * * something elaborate that would make more of an impression. * * * She said she didn't care what she spent." On cross examination this witness testified that she thought this conversation took place in June or July of 1913.

Ferdinand Giovannucci testified that in 1913 or between 1913 and 1915 he saw Mrs. Don Meyer at appellee's studio in New York; that at that time a clay model of the busts of herself and her husband had been made; that Mrs. Don Meyer was looking at some sketches and that she saw "those two busts in clay model"; that he heard "some talk in the studio between Mrs. Don Meyer and Mr. Triebel, * * * about the time I did the first casting of the clay model." * * * She was talking with Mr. Triebel and she said she would like a nice monument for her husband because she loved her husband very much. I heard Mr. Triebel say 'Well, that costs more,' and she says 'It'll make no difference, I love my husband so much I don't care if it costs more--whatever it is.'"

• We are of the opinion and hold that the evidence clearly discloses that the shrine as finally designed and constructed was a more difficult and elaborate piece of sculpture than was contemplated by said parties when the original contract was signed, and was not the shrine appellee contracted to furnish Mrs. Don Meyer; that Mrs. Don Meyer, recognizing this to be true, stated her willingness to pay for a more elaborate and artistic design. Exhibit C. was worked out by appellee, and the work was completed in keeping therewith. The mere fact that the sketch, exhibit 7, may have been sent to Mrs. Don Meyer, and that some of the clay modeling may have been completed for her inspection before the contract of October 29th was signed, does not militate against our holding. The extra work was undertaken and performed by appellee at Mrs. Don Meyer's request for a more elaborate design, which included the statue of Silence. Mrs. Don Meyer, upon the proof being made, would have been liable for this extra work without reference to the contract of October 29th, 1915. Chicago & Great Western Ry. Co. v. Vosburgh, 45 Ill. 311-314; Chicago & E. I. Rr. Co. v. Moran, 187 Ill. 316-324. Said contract, however, is not only evidence of the intention of said parties in reference to the extra work, but also fixes the amount to be paid therefor.

It is also contended by counsel for appellant that the estate should not be liable for interest on this claim.

There was no contention made that the amount of interest allowed was excessive, but only that the court erred in allowing any interest. That being the state of the record, we hold that this assignment of error is not well taken. Heissler v. Stose, 131 Ill. 393-397; Dick Co. v. Sherwood Letter File Co., 157 Ill. 325-338; Bauer v. Hindley, 222 Ill. 319-323; Auto Light Mfg. Co. v. Auto Supply Co., 189 Ill. App. 543-544; E. & E. Ry. Co. v. Crouch Const. Co., 165 App. 35-42.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment Affirmed.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT, 246 I.A. 630⁴

Begun and held at Ottawa, on Tuesday, the ^{fourth} ~~fifth~~ day of ^{October} ~~April~~, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

OCT 25 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Central Trust and Savings	:	
Bank of Geneseo, Illinois,	:	
Appellee,	:	
v.	:	Appeal from the
John F. Kincaid,	:	Circuit Court of
Appellant.	:	Henry County.

Jones J:

Appellee, the Central Trust and Savings Bank of Geneseo, Illinois, filed an amended bill of interpleader in the Circuit Court of Henry County, praying that Charles Dobrinsky and appellant, John F. Kincaid, be required to determine the ownership of \$600 in the hands of appellee. Dobrinsky filed a disclaimer. Appellant Kincaid filed an answer denying the right of appellee to be discharged upon depositing the \$600 with the court, and alleging that it should account for a large amount of profits and interest which have accrued from said fund. He also filed an amended cross-bill for an accounting. Appellee's exceptions to the answer, and demurrer to the amended cross-bill were sustained. A decree was entered ordering appellee to pay the \$600 to the clerk and dismissing the amended cross-bill. The cause is now in this court on appeal by Kincaid.

According to the pleadings appellant and others, on March 2, 1908 entered into a contract for the sale of certain land in Henry County to Dobrinsky, who afterwards refused to accept a deed because of defects in title. In order to close the deal, Kincaid agreed to furnish an abstract showing merchantable title to be approved by Harry E. Brown as attorney for Dobrinsky, and \$600 was deducted from the purchase price and deposited with appellee, to secure the faithful performance of the agreement. In April, 1911, the abstract had not been furnished and Kincaid brought suit in the County Court of Henry County against appellee and Dobrinsky to recover this \$600. There was a judgment

Central Trust and Savings Bank of Chicago,
State of Illinois, Illinois,
Appellee,
vs.
John F. Kincaid,
Appellant.

Page 3:

Appellee, the Central Trust and Savings Bank of Chicago, Illinois, filed an amended bill of interpleader in the Circuit Court of Henry County, praying that Charles Dobynsky and appellant, John F. Kincaid, be required to determine the ownership of \$600 in the hands of appellee. Dobynsky filed a disclaimer. Appellant Kincaid filed an answer denying the right of appellee to the \$600 and claiming that it should be deposited in the court, and alleging that it should account for a large amount of profits and interest which have accrued from said fund. He also filed an amended cross-bill for an accounting. Appellee's exception to the answer, and demurrer to the amended cross-bill were sustained. A decree was entered ordering appellee to pay the \$600 to the clerk and dismissing the amended cross-bill. The decree is now in this court on appeal by Kincaid.

According to the pleading appellant and appellee, in March 2, 1908 entered into a contract for the sale of certain land in Henry County to Dobynsky, who afterwards refused to accept a deed because of defects in title. In order to close the title Kincaid agreed to furnish an abstract showing marketable title to be approved by Henry M. Brown an attorney for Dobynsky, and \$600 was deducted from the purchase price and deposited with appellee, to secure the faithful performance of the agreement. In April, 1911, the abstract had not been furnished and Kincaid started suit in the Circuit Court of Henry County against appellee and petitioned to recover this \$600. There was a judgment

against Kincaid, and he appealed to this court where the judgment was affirmed. (Kincaid v. Dobrinsky, 225 Ill. App. 85.)

The amended bill alleges that Kincaid has never furnished an abstract according to the terms of the agreement; that no abstract of any kind has been approved by Brown; that appellee has at all times been ready, willing, and able to pay said money to the person entitled to it; that Dobrinsky and Kincaid both claim it and that appellee has been harassed and annoyed by the defendants who have threatened to bring suit against it.

The answer of Kincaid admits the facts with reference to the sale of the land and the money being placed in appellee's hands; alleges that at the time appellee received the money, it was a banking corporation authorized under the law to accept and execute trusts; denies that appellee has retained said fund at all times, but alleges that it has used the said fund continuously, has invested it in bonds and has made profits on said investments in excess of interest; alleges that an abstract had been prepared by Brown who was the attorney and acting for Dobrinsky; that Brown willfully and intentionally left out of the abstract certain parts of the record of title; that Kincaid later had an abstract prepared by a competent abstractor and the same was accepted by Dobrinsky; that Dobrinsky at the time of filing the amended bill, was making no claim to the money but had filed an answer waiving all claim to the same; that appellee was a trustee of the money for Kincaid and ought to be required to account for all sums earned by said money while in its hands as trustee; denies that only \$600 was due; and alleges that an additional sum of \$1200 is due as interest and profits.

Kincaid in his amended cross-bill set up the most of the facts alleged in his answer including the allegations that appellee was a trustee, and that as such trustee it had received interest and profits on the fund; that said principal, interest

...and

was affirmed. (Kincaid v. Dobrinsky, 235 Ill. App. 82.)

The amended bill alleges that Kincaid has never furnished an abstract according to the terms of the agreement; that no abstract of any kind has been approved by Brown; that appellee has at all times been ready, willing, and able to pay said money to the person entitled to it; that Dobrinsky and Kincaid both claim it and that appellee has been harassed and annoyed by the statements and have threatened to bring suit against it. The answer of Kincaid admits the facts with reference to the sale of the land and the money being placed in appellee's hands; alleges that at the time appellee received the money, it was a banking corporation authorized under the law to accept and execute trusts; denies that appellee has retained said fund at all times. The answer says it was not until 1900 that Kincaid, has invested it in bonds and has made profits on said investments in excess of \$1200; alleges that no abstract was been prepared by Brown who was the attorney and acting for Dobrinsky; that Brown willfully and intentionally left out of the abstract certain parts of the record of title; that Kincaid is not an abstract prepared by a competent accountant and the same was accepted by Dobrinsky; that Dobrinsky at the time of filing the amended bill, was making no claim to the money but had filed an answer waiving all claim to the same; that appellee was a trustee of the money for Kincaid and ought to be required to account for all sums earned by said money while in his hands as trustee; denies that only \$500 was due; and alleges that an additional sum of \$1200 is due as interest and profits. Kincaid in his amended cross-bill set up the fact of the facts alleged in his answer including the allegations that appellee was a trustee, and that as such trustee it had received interest and profits on the fund; that said principal, interest

and profits were the property of Kincaid and it was the duty of appellee, as trustee, to account for the same, and prayed for an accounting.

The sole question on this appeal is whether the answer and the amended cross-bill set up such a state of facts as entitled appellant to a hearing thereon. The general rule is that where one person receives money for the use of another, his only duty is to hold the money and pay it over at the proper time to the person entitled to it. He is only chargeable with interest on the fund in case of misconduct on his part consisting of bad faith, unreasonable or vexatious delay, fraud or other similar acts. (*Goehegan v. Union Elevated R.R. Co.* 286 Ill. 494; *Highway Commissioners v. City of Bloomington*, 253 id. 164; *Strauss v. Gilbert* 232 id. 441; *Mueller v. Northwestern University* 195 id. 236; *Matthews v. Davis* 191 id. 391.) A bank receiving money to be held for a specific purpose becomes a trustee or agent of the fund received. (*Woodhouse v. Grandall*, 197 Ill. 104; *National Life Insurance Co. v. Mather*, 118 Ill. App. 491; *Mulvihill v. White* 89 id. 88; *Star Cutter Co. v. Smith*, 37 id. 212.) A trustee or agent who receives earnings, profits or income from property held in trust must account to the beneficiary for the same. (*Ward v. Armstrong* 84 Ill. 151; *People v. Small*, 319 id. 437; 1 *Perry on Trusts*. (5th Ed.) Secs. 429-430; 26 *Ruling Case Law*, Secs. 252-253.)

The amended cross-bill alleged that appellee was a trustee, and that as such trustee it received interest and profits from this fund. By the demurrer these facts were admitted to be true. If they are true, appellee is liable to account for whatever amount it received. There was no legal duty on the part of appellee to loan the fund and collect interest on it, but if it did collect interest or profit, it must account therefor. (*People v. Small*, *supra*.) The court was in error in sustaining the demurrer to the cross-bill. In so holding we do not want

and profits with the property of Kincaid and it was the duty of
appellant, as trustee, to account for the same, and prayed for an
accounting.
The wife prays that this appeal is granted for reasons
and the amended cross-bill set up such a state of facts as
entitled appellant to a hearing thereon. The General rule is
that where one person receives money for the use of another,
his only duty is to hold the money and pay it over at the proper
time to the person entitled to it. It is not his duty to
invest on the fund in case of mismanagement on his part consisting
of bad faith, unnecessary or vexatious delay, fraud or other
violation of duty. *Bankers v. Bank*, 121 Ill. 451.
Wright v. Wright, 121 Ill. 451.
v. *Wright* 121 Ill. 451; *Wright v. Wright*, 121 Ill. 451.
121 Ill. 451; *Wright v. Wright*, 121 Ill. 451. A bank receiving money
to be held for a specific purpose becomes a trustee or agent of
the bank receiving it. (*Wright v. Wright*, 121 Ill. 451.)
National Life Insurance Co. v. *Wright*, 121 Ill. 451.
Wright v. Wright, 121 Ill. 451.
A trustee or agent who receives money, profits or income from
property held in trust must account to the beneficiary for the
same. *Wright v. Wright*, 121 Ill. 451.
121 Ill. 451.
Law, Secs. 232-233.)
The amended cross-bill alleged that appellee was a trustee,
and that as such trustee it received income and profits from
this fund. By the former these funds were entitled to be paid.
If they are true, appellee is liable to account for whatever
amount it received. There was no legal duty on the part of
appellee to loan the fund and collect interest on it, but it is
the collected interest or profit, it must account therefor.
(*People v. Small*, supra.) The court was to enter its judgment
in favor of the cross-bill, in so far as it was not

to be understood as saying that appellee did collect any interest and profits for which it is liable. We are not passing on that question. We are merely holding that the allegations of the cross-bill were sufficient to entitle appellant to a hearing thereon.

The decree will be reversed and the cause remanded with directions to overrule the demurrer to the cross-bill and the exceptions to the answer.

Reversed and Remended with directions.

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Revised and Renamed May 1950

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

246 I.A. 631'

BE IT REMEMBERED, that afterwards, to-wit: On

DEC 15 1927

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

October Term, A. D., 1927.

HILDA HARROP,
Defendant in Error,

Writ of Error to
Circuit Court,
Stephenson County.

vs.

EDWIN H. SELLE and FLORENCE E. SELLE,
Plaintiffs in Error.

OPINION by BOGGS, J.

An action on the case was instituted by defendant in error against plaintiffs in error in the Circuit Court of Stephenson County. The declaration, filed November 30th, 1925, consisted of one count, and averred that defendant in error was riding in an automobile owned by one Walter Alneer on State Highway Five running through Stephenson County in a westerly direction; "that the said Walter Alneer was then and there in possession, control of and driving the said automobile. * * * That the defendant, Edwin H. Selle, was the owner of the automobile hereinbefore mentioned as being in his possession, and on the date last mentioned he was riding in said automobile and the said defendant, Florence E. Selle, was driving the said automobile in, along, and upon the highway aforesaid, in the County of Stephenson, and state of Illinois, and the said defendant, Florence E. Selle, drove the said automobile last mentioned on the highway aforesaid toward the automobile driven by the said Walter Alneer, at a place on said highway * * * near a place known as the Ridott Crossing and so negligently, carelessly and improperly ran,

STATE OF ILLINOIS

Second District

October Term, A. D., 1935.

vs.

EDWIN H. SELLER and FLORENCE E. SELLER,
Plaintiffs in Error.

OPINION BY HONORABLE J.

In action on the case was instituted by defendant in

error against plaintiff in error in the Circuit Court of
Stephenson County. The declaration, filed November 20th, 1935,

consisted of one count, and averred that defendant in error was

riding in an automobile owned by one Walter Almer on State

Highway Five running through Stephenson County in a westerly

direction; that the said Walter Almer was then and there in

possession, control of and driving the said automobile.

That the defendant, Edwin H. Sellar, was the owner of the afore-

said automobile mentioned as being in his possession, and on

the date last mentioned he was riding in said automobile and the

said defendant, Florence E. Sellar, was driving the said automobile

in, along, and upon the highway aforesaid, in the County of

Stephenson, and State of Illinois, and the said defendant,

Florence E. Sellar, drove the said automobile last mentioned on the

highway aforesaid toward the automobile driven by the said Walter

Almer, at a place on said highway " " near a place known as the

Right Crossing and as negligently, recklessly and unlawfully

drove, managed and controlled the said automobile that by and on account of the said negligence, carelessness, and improper conduct of the said defendant, Florence Selle, the said automobile in possession of said defendants then and there ran into, upon, and across the automobile in which this plaintiff was riding as aforesaid, driven by Walter Alneer, and struck the said automobile driven by Walter Alneer in which this plaintiff was riding, and this plaintiff was struck with great force and violence and thereby rendered unconscious, and by means whereof this plaintiff, the said Hilda Harrop, was then and there greatly bruised, maimed, lacerated, and divers bones of her body were then and there broken, and she became and was sick, sore, lame and disordered, and so remained for a long space of time, to-wit: from thence hitherto, during all of which time, she the said plaintiff, suffered great pain and was hindered and prevented from attending to and transacting her affairs and business and by means of the said premises, the plaintiff was forced to and did then and there lay out and become liable to pay divers sums of money amounting to Three Hundred Dollars (\$300) in and about endeavoring to cure herself of her wounds, hurts and bruises, all occasioned as aforesaid.

"And the plaintiff avers that she was then and there and immediately prior thereto, in the exercise of due care and caution for her own safety."

A general demurrer filed to said declaration was overruled and an order was entered "that the defendants plead to said declaration by the coming in of court on the first Wednesday of the next term of this court." Thereafter, on motion of plaintiffs in error, it was "ordered that the time to plead be extended to June 3rd, 1926." On May 27, 1927, defendants in error moved the court to enter a rule requiring plaintiffs in error to plead instantler, where upon they elected to stand by their demurrer.

[illegible]

Thereupon it was ordered "that the defendants be and they hereby are adjudged in default for want of a plea." A jury was sworn to assess the damages and returned a verdict for \$525 upon which judgment was rendered. To reverse said judgment, this writ of error is prosecuted.

It is contended by plaintiffs in error that the allegations of the declaration are not sufficient on which to base a judgment against Edwin H. Selle, for the following reasons:

First, because, while the declaration avers the ownership of the car in question in Edwin H. Selle, and that he was riding in the same at the time in question, it does not aver any relationship between plaintiff in error Edwin H. Selle and plaintiff in error Florence E. Selle.

Second, that the declaration fails to sufficiently aver that defendant in error was injured by reason of the collision in question.

Third, that the declaration does not sufficiently aver due care on the part of defendant in error.

On demurrer to a pleading, it is taken and construed most strongly against the pleader. Heller v. Chicago City Railway Co., 256 Ill. 454-456; Sargent v. Baublis, 215 Ill. 428-430; Hoxsey v. St. Louis & S R C Co., 171 App. 109; Wright v. Illinois C R R Co., 119 App. 132.

As to the first contention, counsel for defendant in error state that they do not rely on the "family purpose doctrine" as laid down in Graham v. Page, 300 Ill. 40 and Gates v. Mader, 316 Ill. 313, but insist that the declaration shows Florence E. Selle to have been the agent of Edwin H. Selle. We are of the opinion and hold that the averments of the declaration are not sufficient to show such agency.

As to the second point, while the declaration might have been more specific, we are inclined to hold on general demurrer, that the averment is sufficient to charge the injury to defendant

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It is contended by the defendant in error that the ...
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in error to have been caused through the alleged negligence of Florence E. Selle.

On the last point raised, the averment of due care occurs practically at the close of the declaration, and follows the averments with reference to the effect on defendant in error of the alleged injury, and her efforts and expenses in and about endeavoring to be cured. We are of the opinion and hold that the averment with reference to due care does not sufficiently state that at the time and just prior to said collision defendant in error was in the exercise of due care for her own safety. "The words 'then and there' refer to the time and place last specified, unless some phrase is used in connection therewith which shows that a different reference was intended." Vogrin v. American Steel Co., 263 Ill. 474-476, citing 28 Am. & Eng. Ency. of Law--2d ed. 130; Palmer v. People, 138 Ill. 356.

The second and third grounds urged against the declaration as to plaintiff in error Edwin H. Selle are also urged on behalf of Florence E. Selle. As we have held the third point well taken, the declaration would not be good as to Florence E. Selle. The law further is that in an action of this character, if the judgment must be set aside on account of failure of the declaration to show a cause of action against one of the defendants, it must be reversed and set aside as to both. West Chicago St. Ry. Co. v. Morrison, Adams & Allen Co., 160 Ill. 288-295; Seymour v. Richardson Fueling Co., 205 Ill. 77-82; Jones v. Illinois Printing Co., 205 App. 5-7; Christensen v. Johnston, 207 App. 209-212.

Counsel for defendant in error insist that the rules above set forth do not apply in this case, for the reason that plaintiffs in error, after said demurrer was overruled took leave to plead, and that that amounted in effect to admitting the sufficiency of the declaration.

We are of the opinion and hold that this point is not well taken. So far as the record discloses, the court of its own

The first point raised, the argument of the court, is that the plaintiff's claim is barred by the statute of limitations. The court holds that the statute of limitations is not applicable in this case because the plaintiff's claim is based on a contract which was not yet formed at the time the statute of limitations began to run.

At the time and place where the contract was made, the plaintiff was in the service of the defendant. The court holds that the plaintiff's claim is barred by the statute of limitations because the plaintiff's claim is based on a contract which was not yet formed at the time the statute of limitations began to run.

The second and third points raised by the plaintiff are that the defendant's claim is barred by the statute of limitations and that the defendant's claim is barred by the statute of limitations. The court holds that the defendant's claim is barred by the statute of limitations because the defendant's claim is based on a contract which was not yet formed at the time the statute of limitations began to run.

General for defendant is that the plaintiff's claim is barred by the statute of limitations. The court holds that the plaintiff's claim is barred by the statute of limitations because the plaintiff's claim is based on a contract which was not yet formed at the time the statute of limitations began to run.

motion entered an order on plaintiffs in error to plead. While at the succeeding term, on motion of plaintiffs in error, the rule to plead was extended, there is no showing that at any time plaintiffs in error asked leave to plead. At the term in which judgment was rendered, plaintiffs in error announced to the court that they elected to stand by their demurrer, judgment then should have been rendered nil dicit. Plaff v. Pacific Exp. Co., 251 Ill. 243-247; Mason & Trent Bros. v. Neal, 204 App. 538-542. We therefore hold that the sufficiency of the declaration is to be tested on the question as to whether or not it was good on general demurrer. Construing the averments of the declaration most strongly against the pleader they are not sufficient on which to base a judgment. The Court therefore erred in overruling said demurrer. The fact that a jury was called to assess the damages does not change the rule, as the jury had nothing to do with the issues in the case.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

From the reasons above set forth, the judgment of the
court was affirmed, and the jury was ordered to return a
verdict in favor of the plaintiff. The court thereupon
advised the jury that the case was closed, and the jury
retired to deliberate. The jury returned a verdict in
favor of the plaintiff, and the court thereupon entered
its judgment in accordance with the verdict of the jury.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

246 I.A. 631²

BE IT REMEMBERED, that afterwards, to-wit: On

DEC 15 1927 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

October Term, A.D., 1927

THE PEOPLE OF THE

STATE OF ILLINOIS,
Defendants in Error,

vs.

Error to the
County Court of Rock
Island County.

JOY BURNS AND WIL-

LIAM NOREN,
Plaintiffs in Error.

OPINION by BOGGS, J.

An information was filed in the county court of Rock Island County charging plaintiffs in error with the violation of the Illinois Prohibition Statute. The first count of the information charged the unlawful possession of intoxicating liquor, with intent, etc. The second count charged the unlawful sale of intoxicating liquor. A plea of not guilty was entered, and on the trial plaintiffs in error were each found not guilty under the count charging an unlawful sale, and guilty under the count charging unlawful possession. Plaintiffs in error were severally fined \$600 and costs, to be worked out, etc., if not paid.

It was assigned as error that the county judge did not examine and certify the information and affidavit as to probable cause for filing same. The information having been signed and presented by the state's attorney, it was not necessary that it be so certified. Gallagher v. People, 120 Ill. 179-182.

It is strenuously insisted by counsel for plaintiffs in error that the evidence is not sufficient to support the verdict

IN THE
COURT OF THE COMMON PLEAS
FOR THE COUNTY OF ILLINOIS

October Term, 1911

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

John J. Cook, Plaintiff,
vs.
The People of the State of Illinois, Defendant.

THE COURT, by the

following order:

ORDER OF COURT.

An information was filed in the county court of Cook
County charging plaintiff with the violation of
the Illinois Prohibition Statute. The first count of the infor-
mation charged the unlawful possession of intoxicating liquor,
with intent, etc. The second count charged the unlawful sale of
intoxicating liquor. A plea of not guilty was entered, and on
the trial plaintiff in error was found not guilty under
the count charging an unlawful sale, and guilty under the count
charging unlawful possession. Plaintiff in error was
fined \$500 and costs, to be worked out, etc. It was held.
It was assigned as error that the county judge did not
examine and certify the information and affidavits as to probable
cause for filing same. The information having been assigned and
presented by the state's attorney, it was not necessary that it
be so certified. Gallagher v. People, 180 Ill. 145-146.
It is strenuously insisted by counsel for plaintiff in
error that the evidence is not sufficient to support the verdict.

and judgment.

The record discloses that about eight o'clock, in the evening of August 6, 1926 the sheriff, two of his deputies and a police officer of the city of Moline went to the home of plaintiff in error, Joy Burns, with a warrant to search her premises for intoxicating liquors. Joy Burns lived in the second story of a building on Fifteenth Street in Rock Island. The officers went up the back stairway, kicked open the outside door and found plaintiffs in error in the bathroom. Certain of the officers testified that when they entered the bathroom, plaintiff in error Noren was pouring something into the toilet or bathtub; that the bathroom floor was damp and had the odor of "hootch" or intoxicating liquor; that they found some broken glass in the bathtub, and took from the tub certain of the liquid found therein, placing the same in a bottle marked Exhibit B. James Green, Carl Johnson and two women were also on the premises at the time of the raid. Green had a bottle of liquor in his pocket, which Steve Outlitch, one of the deputies, took possession of, and which was offered in evidence as Exhibit A.

Green testified that on the evening in question he and his companion Johnson purchased a pint of intoxicating liquor from plaintiff in error Joy Burns, paying her therefore \$1.50; that this was the bottle of liquor taken by Outlitch; that some four or five days prior thereto, he had gone to the home of plaintiff in error Burns and had bought of plaintiff in error Noren a pint of whiskey and a pint of peach brandy for which he paid him \$3.00; that he and certain other persons drank this liquor.

The witness Green further testified that it had been pre-arranged with the sheriff's force that he and his companion should go to the home of plaintiff in error on the evening in question, and that the place was to be thereafter raided by the sheriff's force; that shortly after he entered the premises, the telephone rang and plaintiff in error Burns went to the telephone and said:

The first thing I noticed when I stepped out of the car was a strong sense of relief. The air was fresh and the sun was shining. I had been sitting in the car for what felt like hours. I looked around and saw a few people walking on the sidewalk. They were all dressed in casual clothes. I felt a bit out of place, but I didn't mind. I was just happy to be outside.

As I walked, I noticed a few people looking at me. I didn't mind that either. I was just a regular person, and I was just going about my business. I walked for a few minutes and then I saw a sign that said "Coffee Shop". I decided to go in. I ordered a cup of coffee and sat at a table. I looked out the window and saw a few cars parked on the street. I felt a bit better now. I was in a familiar place, and I was doing what I needed to do.

I walked back to the car and got in. I started the engine and drove home. I felt a bit better now. I was in a familiar place, and I was doing what I needed to do. I walked back to the car and got in. I started the engine and drove home. I felt a bit better now. I was in a familiar place, and I was doing what I needed to do.

The first thing I noticed when I stepped out of the car was a strong sense of relief. The air was fresh and the sun was shining. I had been sitting in the car for what felt like hours. I looked around and saw a few people walking on the sidewalk. They were all dressed in casual clothes. I felt a bit out of place, but I didn't mind. I was just happy to be outside.

"They are? Who is this?" That she then hung up the receiver and started toward the back of the house. The evidence on the part of the People is also to the effect that the back door was open as the officers were starting up the stairs, and that plaintiff in error Burns closed the back door and bolted it.

The sheriff caused the contents of the bottle turned over to the deputy sheriff by Green to be examined for its alcoholic content, and also the bottle containing the liquid taken from the bathtub. A. E. Anderson, the chemist employed to make the examination, testified that the bottle which Green turned over to the deputy sheriff, contained 46.20% of alcohol by volume, and that the bottle containing the liquid taken from the bathtub contained 9.46% of alcohol by volume.

Plaintiffs in error both testified that they never sold Green or his companion any intoxicating liquor; that they had no intoxicating liquor on the premises at the time of said raid; that plaintiff in error Burns was sick^K and that Noren was giving her some sort of cordial at the time in question. The evidence on behalf of plaintiffs in error is to the effect that plaintiff in error Noren and his son and one or two other persons were rooming and boarding with plaintiff in error Burns.

On the motion for new trial, plaintiffs in error presented the affidavit of James Green to the effect that he had wrongfully testified to having purchased liquors of plaintiff in error Burns, and that he had testified to having done so on the promise of the deputy sheriff Cutlitch to pay him \$5.00 for procuring liquor and for securing a conviction, and for swearing out a search warrant. However, on the hearing on said motion, Green came in and testified that his testimony given on the trial was true; that plaintiffs in error had stated or caused to be stated to him that he had been double-crossed and that if he wanted to avoid any further appearance in court he could do so by making this affidavit. Carl Johnson, his companion, also testified on the

hearing that he was with Green, and that Green purchased the liquor in question as he had testified on the trial.

The evidence being conflicting, it was for the jury to say which of the witnesses they believed. If they believed the testimony of the People's witnesses, it amply sustained their verdict. The jury found plaintiffs in error not guilty of the sale of intoxicating liquors, so the testimony of Green was not so important as it otherwise would have been.

Courts are reluctant to substitute their opinion for that of the jury upon controverted questions of fact, and it is only when the court is able to say from a careful consideration of the whole testimony that there is clearly a reasonable and well founded doubt of the guilt of the accused, that it will interfere on the ground that the evidence does not support the verdict. Steffy v. People, 130 Ill. 98; Lathrop v. People, 197 Ill. 169; People v. LeMorte, 289 Ill. 11-24; People v. Jarecki, 291 Ill. 80-83.

It is contended by plaintiffs in error that the court erred in admitting in evidence certain small glasses, an ice pick and a funnel, which were found on the premises of plaintiff in error Burns. The testimony discloses that one of the glasses had the odor of intoxicating liquor. While it is not clearly apparent why the court should have admitted these exhibits, we are of the opinion and hold that doing so did not constitute reversible error.

It is also contended that the evidence fails to show that the liquid dipped from the toilet or bathtub was fit for beverage purposes. It was not necessary to make such proof. People v. Bergen, 309 Ill. 488-491.

It is next contended that the court erred in giving the People's second instruction, being as follows:

"You are instructed that circumstantial evidence in criminal cases is the proof of such facts and circumstances,

all members must be at least 18 years old

Don't need to be worried as the following information is also

Subject is a 30-year-old male, single, at present in a stable position.

...of the

...the evidence does not suggest the contrary. Still, ...

[illegible]

73-96 .III 192 , 1930-31 .V 1930-31 : 43-11 .III 1932

Source: *1911 Census of the United States*, Vol. 1, Part 1, Table 1, p. 11.

There is no evidence in this case that the defendant was involved in the conspiracy.

and "Themselves to acknowledge and no longer as a child", January 2, 1900

From the above it is seen that the only person who was in contact with the defendant at the time of the murder was the defendant's mother, Mrs. Mary J. Smith, who was in the company of the defendant at the time of the murder.

The above of interesting history. This is not clearly apparent.

[illegible]

.III 038 .I67-197

connected with or surrounding the commission of the crime, as tends to show the guilt or innocence of the party charged. And if the facts and circumstances shown by all of the evidence in this case are sufficient to satisfy you of the defendants' guilt beyond a reasonable doubt, then such evidence is sufficient to authorize you in finding the defendants guilty. The law demands a conviction wherever there is sufficient legal evidence to show the defendant's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence."

The giving of this instruction was not erroneous.

Parsons v. People, 218 Ill. 386-395; People v. Anderson, 299 Ill. 168-182; People v. Lalor, 290 Ill. 234-240; People v. Snyder, 279 Ill. 435-442.

It is next insisted by counsel for plaintiffs in error that the court erred in giving the People's third instruction. This instruction has to do with the weight and credit to be given to the testimony of plaintiffs in error. Counsel concede that this instruction has been approved in numerous cases, but insist that the giving of the same was erroneous. The court did not err in giving this instruction. Siebert v. People, 143 Ill. 571-592; Spears v. People, 220 Ill. 72-78; People v. Snyder, 279 Ill. 435-442; Jennings v. People, 189 Ill. 320-325. In the latter case the court at page 325 says:

"It is a verbatim copy of instruction number three approved by the court in Hirschman v. People, 101 Ill. 568, save that the words 'and during the trial,' are omitted. This omission rendered the instruction only the more favorable to plaintiffs in error."

The same thing obtains in this instruction, as those words are omitted.

It is also insisted that the court erred in giving the People's sixth instruction, being as follows:

"You are instructed that if you believe from all the

[illegible]

evidence in the case beyond a reasonable doubt that the defendants committed the crime in question in manner and form as charged in the information, it will be your sworn duty as jurors to find him guilty."

The complaint made of this instruction is that it refers the jury to the information. Counsel for plaintiffs in error cite Lerette v. Director General, 306 Ill. 348 in support of this contention. That was a civil suit, and the court there was discussing the matter of the instructions referring the jury to the declaration. The rule laid down in this connection in civil cases has not obtained in criminal cases. People v. Parker, 97 Ill. 32-37; Christy v. People, 206 Ill. 337-343. Even if the same rule did obtain in criminal cases as in civil cases, plaintiffs in error are not in a position to complain, for the reason that the eighth, tenth and twelfth instructions given on behalf of plaintiffs in error refer the jury to the information.

It is also insisted that the court erred in giving the instruction offered by the people as to the form of the verdict. We have examined this instruction in connection with the objections made to it, and are of the opinion and hold that the court did not err in giving the same.

It is also insisted that the court erred in refusing to give the seventeenth and eighteenth instructions offered on behalf of plaintiffs in error. We have examined these instructions in connection with the arguments of counsel in connection therewith. The seventeenth instruction does not state a correct principle of law, and the court therefore did not err in refusing the same. The eighteenth instruction is misleading and would tend to work a disagreement among the jurors. Instructions of this character have always been condemned by our courts. Little v. People, 137 Ill. 153-157; People v. Lee, 237 Ill. 272-277; People v. LeMorte, supra, 19; People v. Lardner, 296 Ill. 190-194.

...that the office is working in connection with the ...

...the information was furnished to the ...
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...the information was furnished to the ...

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

RECEIVED BY THE SECRETARY OF THE ARMY

OFFICE OF THE SECRETARY OF THE ARMY

WASHINGTON, D. C.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2461.A. 631³

BE IT REMEMBERED, that afterwards, to-wit: On

DEC 15 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In The
APPELLATE COURT OF ILLINOIS,
Second District

October Term, A.D., 1927.

JENNIE CLARK,
Appellee,
vs.
CITY OF STREATOR,
Appellant.

Appeal from the
Circuit Court of
La Salle County.

OPINION by BOGGS, J.

Appellee recovered a judgment for \$1,500 against appellant in the circuit court of LaSalle County, for injuries sustained by her in falling on a sidewalk in the City of Streator. To reverse said judgment, this appeal is prosecuted.

Appellee, who was then about 53 years of age, was a waitress in a restaurant in Streator, where she had been employed at various times for about seven years. On January 22, 1924, she was walking on a brick sidewalk on the north side of Broadway in said city, which said street ran in an easterly and westerly direction. There had been a snow or sleet storm a day or two before, and the sidewalk was slippery and had water standing on it in various places. It was a bright day and the sun was melting the ice. Appellee was wearing slippers that she wore while working in the restaurant. She was walking in or near the middle of the sidewalk when she slipped and fell into a depression in the sidewalk, which depression measured about 18 inches wide and some 23 inches long. The testimony on the part of appellee is to the effect that said depression at its deepest point was some six or seven inches below the level of the sidewalk. The testimony

IN THE
CIRCUIT COURT OF INDIANA,
Second District

October Term, A.D., 1935

Appellant from the
Circuit Court of
De Salis County.

Appellee,

vs.

CITY OF INDIANAPOLIS,
Appellee.

CELESTINE BY ROGERS, J.

Appellee recovered a judgment for \$1,500 against
appellant in the circuit court of De Salis County, for injuries
sustained by her in falling on a sidewalk in the City of Indianapolis.

To reverse said judgment, this appeal is prosecuted.

Appellee, who was then about 55 years of age, was a
waitress in a restaurant in Ellettsport, where she had been employed
at various times for about seven years. On January 22, 1934, she
was walking on a brick sidewalk on the north side of Broadway in
said city, which said street runs in an easterly and westerly direc-
tion. There had been a snow or frost storm a day or two before,

and the sidewalk was slippery and had water standing on it in
various places. It was a bright day and the sun was shining in
the restaurant. She was walking in or near the middle of the
sidewalk when she slipped and fell into a depression in the sidewalk,
which depression measured about 18 inches wide and some 12
inches long. The testimony on the part of appellee is to the
effect that said depression at its deepest point was some six or
seven inches below the level of the sidewalk. The testimony

of appellant's engineer is to the effect that at said point it was five inches deep. Appellee's ankle was broken by her fall, and the evidence discloses that her ankle is permanently enlarged and weakened, and at times gives her considerable pain. The doctor who waited on her testified that this condition was probably permanent. As no question is made with reference to the amount of the verdict, it will not be necessary to further discuss the extent of appellee's injuries.

The declaration consists of three counts. The first count charges that on January 22, 1924 and for more than a year next prior thereto, appellant "wrongfully and negligently suffered and permitted a portion of said sidewalk on the north side of Broadway * * *, to be and remain in bad and unsafe repair and condition, * * * with a hole or depression in said sidewalk, to-wit, one foot across and, to-wit, six inches deep, into which pedestrians passing upon and along said sidewalk there were liable to step and fall, which condition plaintiff avers had existed for a long time, to-wit, one year prior to the date aforesaid, and was known to the officers and employees of the defendant or, if they had been in the exercise of reasonable care, would have been known to them on the date of and long prior to the accident to plaintiff." That while in the exercise of due care * * * "plaintiff stepped into and caught her foot in said hole * * * and was thrown and fell * * * and thereby broke her right ankle and twisted, turned and wrenched her back," etc.

The second count is practically the same as the first, except that it states that snow had formed a ridge six inches high near the hole and that appellee stepped upon the ridge of ice and was thrown, etc. The third count alleges that the snow had melted and been converted into ice, forming a slippery ridge around said hole, and that appellee stepped upon said ridge or the slippery side of said hole, caught her foot in said hole, and because thereof was thrown to the sidewalk, etc.

It appears a complaint is on the record that the victim
was the same man. The victim's name was John J. Smith.
and the witness believed that the man was the same man who
was killed, and at times gives the name as John J. Smith.
The witness who waited on her testified that this condition was probably
the same. As no question is made with reference to the amount of
the verdict, it will not be necessary to further discuss the extent
of appellee's injuries.

The description consists of three counts. The first
count charges that on January 22, 1924 and for some time a year
next prior thereto, appellant "wrongfully and unlawfully" caused
and procured a portion of said sidewalk on the north side of
Broadway * * * to be dug up and removed and
replaced * * * with a hole or depression in said sidewalk, to-wit:
one foot across and, to-wit, six inches deep, into which holes
trains passing upon and along said sidewalk were liable to
fall and fall, which condition existed every day and existed for a
long time, to-wit, one year prior to the date aforesaid, and was
known to the officers and employees of the defendant on, it being
well known in the exercise of reasonable care, would have been known
to them on the 6th of said year prior to the accident to plaintiff.
That while in the exercise of due care * * * plaintiff fell
into and caught her foot in said hole * * * and was thrown and
torn * * * and thereby broke her right ankle and twisted, bruised
and wrenched her back, etc.

The second count is practically the same as the first,
except that it states that now and then a hole was made
high upon the hole and that appellee caused the hole to be
so and was known, etc. The third count alleges that the snow
had melted and been converted into ice, forming a slippery
around said hole, and that appellee stepped upon said hole and
slipped side of said hole, caught her foot in said hole, and
became thrown and thrown to the sidewalk, etc.

A plea of the general issue was filed, and the trial resulted in a verdict and judgment as above set forth. To reverse said judgment, this appeal is prosecuted. No complaint is made of the rulings of the court on the evidence, or the instructions, or as to the amount of the verdict.

One of the grounds relied on for a reversal of said judgment is that the court erred in overruling the motion made by appellant at the close of appellee's evidence, and again at the close of all the evidence, to exclude the same and direct a verdict in favor of appellant. Counsel insists that the evidence in the record clearly discloses that said sidewalk on the day in question was in a reasonably safe condition.

The only material conflict in the evidence is with reference to the depth of the hole or depression in question, and as to whether or not on the day appellee fell, this depression was partially filled with cinders or dirt, and if so, to what extent. That there had been a snow or sleet storm just a day or so prior to the day in question, and that the sidewalk was in a slippery condition, with water standing on the same, is shown by the testimony of the witnesses, both for appellee and for appellant.

R. G. Soderstrom, a witness on behalf of appellee, and who was a member of the General Assembly testified that the hole or depression in said walk on the 21st day of January 1924, was between ten or twelve inches north and south, and fully eighteen inches east and west, and about six or seven inches deep, and was located on the south half of the sidewalk. * * * It had been there possibly twelve or fifteen months, in the same condition. On cross examination this witness testified: "When I say hole I mean that it slanted down, that is, in the center of the hole, possibly, oh, four or five inches in the inside, would be six or seven inches deep--the center of the hole, and it gradually sloped up to the rest of the sidewalk. * * * I was over that sidewalk the next day, I believe, two or three days later, and there was ice around the

A plan of the general layout was filed, and the trial proceeded in a variety of ways as shown in the record. The court at the trial of the case on the evidence, or the instructions, was as to the amount of the verdict.

One of the grounds relied on for a reversal of said judgment is that the court erred in overruling the motion made by appellant at the close of appellee's evidence, and again at the close of all the evidence, to exclude the same and direct a verdict to favor of appellee. (Grounds) Inasmuch as the evidence in this case clearly discloses that said sidewalk on the day in question was in a reasonably safe condition.

The only material conflict in the evidence is with reference to the depth of the hole or depression in question, and as to whether or not on the day appellee fell, this depression was actually filled with slush or dirt, and if so, to what extent. That there had been a snow or sleet storm just a day or so prior to the day in question, and that the sidewalk was in a slippery condition, with water standing on the same, is shown by the testimony of the witnesses, both for appellee and for appellant.

R. G. Robertson, a witness on behalf of appellee, who was a member of the General Assembly testified that the hole in question is well known on the city of Chicago, and is located between ten or twelve inches north and south, and four or five inches east and west, and about six or seven inches deep, and was located on the south half of the sidewalk. It had been there for some time, and was well known to the public. In the case mentioned, the court in its opinion said: "When I was told I mean that it started down, that is, in the center of the hole, possibly, or four or five inches in the middle, would be a fair statement to the jury--the center of the hole, and it gradually sloped up to the rest of the sidewalk." I was told that sidewalk was not too deep, two or three days later, and there was no snow on it.

hole, but it was approximately the same as it had been before, with the exception that the sidewalk was slippery."

James F. Lynch, a witness for appellee, testified: "There was a hole in that sidewalk about sixty feet west of Park Street. It was fourteen inches east and west and possibly ten or twelve inches crosswise, north and south, and about six or seven inches deep. It has existed about two years, during all of which time it was in about the same condition." On cross examination he was asked with reference to cinders, and stated: "I never saw any cinders in it; no, sir--I did after, the next morning after the accident, I think it was filled up with dirt and I saw it this forenoon and it was filled with dirt and dirt tramped into it."

Appellee testified that on the day in question "there had been a slight storm some time before that, and the ice was melting. It was a bright day--I was walking along very carefully, trying to avoid the water, and I stepped in a little place near there and I slipped and fell in and my foot got caught. There was a hole south of the middle of the sidewalk, and when I fell in, my foot got caught and I stooped down and picked my foot out of there with my hands and got my foot out of the hole before I could get up. It was my right foot--I fell to the side and then fell back, fell right into the hole on the south side and then fell right back and my foot got caught. My foot was fast and I had to work it out with my two hands. It broke the bone--my right ankle.

On cross examination appellee testified: "It was a brick sidewalk and there was water standing in the sidewalk, in pools. The water was all along in different places. * * * The hole was full of water and it seems that the sidewalk where my foot went down was where it was washed out, where the dirt was out of it.

"Q. Was the brick protruding at the edge of the walk so as to make a sharp edge that held your foot in there?

"A. Either the brick and dirt, some way, I could not get my foot out of it.

the exception that the sidewalk was slightly.

[illegible]

"Q. Where were you on the walk when you slipped?

"A. Why, in about the middle of the walk.

"Q. Did the hole extend to the middle of the sidewalk?

"A. Pretty near in it.

"Q. You did not slip on the side of the hole, did you?

"A. No--right at the edge of the hole, middle of the sidewalk. I slipped from the water right into it--the ice.

"Q. Where you slipped, it was just simply smooth, simply slippery with ice?

"A. Yes, sir.

"Q. Then you slipped over into the hole?

"A. Yes, where the water was."

On redirect examination the witness Lynch testified:

"The berm was higher than the sidewalk, and water accumulated--every time we got a heavy rain it lays there--slush of any kind, snow."

William Benz, a witness for appellant, testified that he was a member of the fire department; that he had his attention called to the depression in the sidewalk along in the spring, about May, 1924. He stated that he could see the depression, but that it was covered with dirt, "the dirt was level across the sidewalk." This witness also testified: "During the month of January 1924 there was an awful sleety night. The sidewalk was covered with sleet."

Fred H. Renz, city engineer, testified on behalf of appellant to the effect that on May 12, 1924 he measured the depression in question; that "the depression starts from the south edge of the sidewalk and extends north eighteen inches; east and west it is twenty-three inches. At the time I was there, why, there was dirt or cinders or a mixture in the hole." He further testified that he had the dirt taken out and then measured, and that the lowest part of the depression was five inches below the surface of

Q. Now, when you saw the airplane?

A. Yes, it came over the hills at the north.

Q. Did you see it at the north of the airplane?

A. Twenty miles or so.

Q. The airplane was over the hills at the north?

A. Yes, it was over the hills at the north.

Q. Did you see the airplane from the north?

A. Yes, I saw it from the north, it was just simply coming, simply flying.

Q. Yes?

A. Yes, sir.

Q. Then you slipped over into the hole?

A. Yes, where the water was.

Q. Did you see the airplane from the north?

A. Yes, I saw it from the north, it was just simply coming.

Q. Every time we got a heavy rain it fell there--about of my mind.

A. Yes.

Q. William Reed, a witness for applicant, testified that

he was a member of the Fire Department; that he had his attention

called to the airplane in the sidewalk along the street, about

May, 1934. He stated that he could not see the airplane, but that

it was covered with dirt, "the dirt was level across the sidewalk."

This witness also testified: "During the month of January 1934

there was an awful windy night. The sidewalk was covered with

dirt."

Q. Fred H. Reed, city engineer, testified on behalf of

applicant to the effect that on May 14, 1934 he observed the

airplane in question; that "the airplane was about the same

size of the airplane and extensive north-south tracks; and that

there is in twenty-five tracks. It was also I was there, why, there

was dirt or clumps of a distance in the hole." He testified that

that that he had the dirt taken out and then removed, and that the

lowest part of the depression was filled in with dirt under the surface of

the sidewalk before the dirt had been removed.

A. G. Rich testified on behalf of appellant that he was assistant to the city engineer; that he saw the sidewalk in question in May 1924; that "the defect consisted of a depression along the edge of a brick sidewalk, and through some natural conditions there was some dirt in there. * * * The dirt and cinders seemed to be packed in."

William Pugh, one of the commissioners of said city, testified that he saw the sidewalk in 1924; that "it looked as if there was no depression at all, only dirt along there, that is all. It is in good, passable condition. There has been no tamping of any dirt in that hole or other work to repair it." On cross examination he testified: "I don't know what the conditions were at the time of the accident, but it looks the same to me now as it did in May 1924."

George Harland testified on behalf of appellant that he was the street superintendent for appellant; "my attention has never been called to any hole or depression or any defect in that sidewalk, until the time this accident occurred. My attention was not called to it until the spring of 1924, I would say in the month of April. I then made an inspection of the walk; found a slight depression at the south side of the walk."

It will be observed that none of appellant's witnesses undertook to testify with reference to the condition of said hole or depression as it existed on January 22, but the examinations they made were in April or May, some three or four months after the accident. There being no serious conflict in the evidence, except with reference to the depth of said hole or depression, we would not be warranted in holding that the manifest weight of the evidence was to the effect that the sidewalk in question was in a reasonably safe condition for the travel of pedestrians. It was a question of fact for the jury as to whether or not the sidewalk at the place in question was in a reasonably safe condition.

the sidewalk before the first hole was removed.

A. G. Rich testified on behalf of applicant that he was present at the city engineer's office on the sidewalk in question in May 1934. That the sidewalk consisted of a depression about the size of a brick sidewalk, and there were several conditions which were some dirt in there. "The dirt and stones seemed to be

William Tugh, one of the commissioners of said city, testified that he saw the sidewalk in 1934; that it looked as if there was no depression at all, only dirt along there, that is all. It is in good, passable condition. There has been no digging or any dirt in that hole or other work to repair it. "On every occasion he testified: "I don't know what the condition was at the time of the accident, but it looks the same to me now as it did in May 1934."

George Handberg testified on behalf of applicant that he was the street superintendent for applicant; "My observation was never been called to any hole or depression or any defect in that sidewalk, until the time this accident occurred. My attention was not called to it until the spring of 1934. I would say in the month of April. I then made an inspection of the sidewalk and found a slight depression at the north side of the sidewalk."

It will be observed that none of applicant's witnesses undertook to testify with reference to the condition of said hole or depression as it existed on January 22, but the examination and note were in April or May, some three or four months after the accident. There being no witness called by the applicant, except with reference to the depth of said hole or depression, we could not be warranted in holding that the condition of the sidewalk was to the effect that the sidewalk in question was in a reasonably safe condition for the travel of pedestrians. It was a question of fact for the jury as to whether or not the sidewalk at the place in question was in a reasonably safe condition.

City of Galesburg v. Higley, 61 Ill. 287-290; City of Pana v. Taylor, 56 App. 60-64; City of Chicago v. Sullivan, 139 App. 675-679; Maxey v. City of E. St. Louis, 158 App. 627-630; McComb v. Chicago, 183 App. 243-245; Miranda v. Collinsville, 206 App. 166; Loyd v. City of E. St. Louis, 235 App. 353.

Counsel for appellant, as we understand, does not seriously contend that appellee was not in the exercise of due care for her own safety just prior to and at the time of said injury. Appellee specifically testified that she was using care just prior to and at said time; that the hole or depression was filled with water, that she slipped on the walk just at the edge of the depression and as a result thereof her foot slid into and was caught in the depression and her ankle was thereby broken. The testimony of appellee is to the effect that the hole or depression in said sidewalk was filled with water, so that it would not be apparent to a person passing along the same in the exercise of ordinary care. Taken as true, with all reasonable intendments to be drawn therefrom the evidence on behalf of appellee tended to prove her cause of action. The court therefore did not err in overruling appellant's motions to exclude the evidence and direct a verdict in its favor.

We are also of the opinion and hold that the verdict of the jury on the question of the due care of appellee, and on the question of the negligence of appellant, is not against the manifest weight of the evidence, and the court did not err in overruling the motion for a new trial. Lus~~u~~ v. Throop, 189 Ill. 127-132; Roloff v. Luer Bros. Packing Co., 263 Ill. 152-158; Doak v. Rhoads, 188 App. 88-89; Atlas Floor Co., v. Kesner, 192 App. 458.

It is contended by counsel for appellant that there is nothing in the record tending to prove that the accident in question was the proximate result of the city's failure to repair the defect in said sidewalk. Unless the evidence is such that a court can say as a matter of law that it was not the proximate cause of appellee's injury, it would be a question for the jury. Landgraf v. Kuh, 188

[illegible]

On appeal from the trial court's judgment, the defendant moved for summary judgment, claiming that the evidence was such that no reasonable jury could find in favor of the plaintiff.

It was killed with a gun, so that it would not be apparent to a person passing along the street at ordinary hours.

[illegible]

It is contended by counsel for appellant that there is nothing in the record tending to prove that the defendant is guilty of the offense charged in the indictment. It is also contended that the evidence is such that the jury should be directed to acquit the defendant. The court, however, is of the opinion that the evidence is such that the jury should be directed to find the defendant guilty of the offense charged in the indictment.

Ill. 484-492; Schultz v. Ericsson Co., 264 Ill. 156-167; Stone v. Donk Bros., 199 App. 64-71.

Counsel for appellant in their reply brief attempt in effect to raise the question of a variance between the allegations of appellee's declaration and the proof. The question of variance was not raised on the trial of said cause by objection to the evidence or on motion to exclude the same. Neither was the question of variance specifically pointed out in the motion for a new trial. This being the state of the record, appellant is not in a position to raise the question at this time. Lake Shore & M. S. Ry. Co. v. Ward, 135 Ill. 511-516; Richelieu Hotel Co. v. Military Encampment Co., 140 Ill. 248-259; Libby, McNeill & Libby v. Scherman, 146 Ill. 540-549; City of Chicago v. Seben, 165 Ill. 371-376; Chicago & N. W. Ry. Co. v. Gillison, 173 Ill. 264-270; Zellers v. White, 208 Ill. 518-523; City of Chicago v. Bork, 227 Ill. 60-62; Flanagan v. Walls Bros. Co., 237 Ill. 82-87; 21 R. C. L. p. 605, sec. 149.

In Libby, McNeill & Libby v. Scherman, *supra*, the court at page 549 says:

"It is true that one of the grounds assigned by the defendant in its motion for new trial was in these words: 'There is a variance between the declaration and the proof,' but even there the variance was not pointed out. This was not sufficient. It was not incumbent upon the trial judge upon such challenge to grope through the record in an endeavor to discover a variance, but it was the duty of the defendant's counsel, if one existed, to point it out and call attention to it specifically, and having failed so to do, he must be deemed to have waived the objection."

The evidence in the record does not support the allegations of the second count of appellee's declaration, but we are of the opinion and hold that, the question of variance not having been raised in the trial court, the verdict is sustainable on either

111. 100-101. Life v. Wisconsin Co., 234 Ill. 183-187; 230 Ill.

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the first or third counts of said declaration.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

THESE ARE THE RESULTS OF THE

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RESEARCHERS

RESEARCHERS

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT;

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

246 I.A. 631⁴

BE IT REMEMBERED, that afterwards, to-wit: On

DEC 22 1927 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

Wade A. Abbott,
Appellee,

Appeal from Circuit Court
of Kankakee County

v.

E. N. Betourne Bus Line
A Corporation,
Appellant,

Jones, J.

This is an appeal from a judgment for \$915 in favor of appellee, Wade A. Abbott, and against appellant, E. N. Betourne Bus Line, a corporation, in an action on the case to recover for injuries which appellee received in an automobile collision. The collision occurred on September 7, 1925 on a road known as the East Court Street Road, leading from Kankakee east to state highway No. 1. Appellant was operating a motor bus line and one of its busses was proceeding east from Kankakee on the above mentioned road. Appellee and his family were following the bus on the highway in a Ford sedan. The road crosses the Kankakee River; and 200 or 300 feet beyond the highway bridge over the river is a summer-resort park known as the "Avon". A cinder road leads from the highway to the park entrance. The ground in the park is about six feet lower than the level of the road. The shoulder on each side of the roadway in front of the park is from four to six feet wide and consists of sand covered with sod. To the south of the shoulder there is a ditch about five or six feet wide, the sides of which are not shored or braced. On the morning in question the weather was misty; it had been raining and the evidence tends to show the pavement was more or less slippery.

The bus was used for carrying passengers and was about twenty-one feet long and eighty inches wide, equipped with pneumatic tires. It also had a stop light which was connected with the foot brake and with the clutch, but was not connected with the emergency brake. Appellant claims that the bus was running at a speed of twenty to twenty-two miles an hour, and came to a

gradual stop at a point from fifty to one hundred fifty feet east of the entrance to the Avon park. Appellee claims he was going about 20 miles an hour and that the bus stopped suddenly; that he attempted to stop his car but it skidded, and in order to avoid striking the bus, he turned his car to the left to go around it; that a car coming from the opposite direction reached the bus at about the same time; that while he was attempting to go around the bus, the rear end of his car collided with the bus and the front end of his car was struck by the car coming from the east. It is further claimed by appellee, and he so testified, that the left wheels of the bus at the time it stopped were from eight inches to a foot north of the center line of the highway. Appellee's testimony that the bus stopped suddenly was corroborated by one or two other witnesses. On the other hand the operator of the bus and a number of the passengers testified that the bus did not come to a sudden stop but stopped gradually and that all its wheels were south of the center line of the pavement. The facts in the case were in dispute and should have been fairly submitted to the jury.

During the trial of this cause, A. G. Garrison was called by appellee and testified that he witnessed the collision and had given a Mr. Rutherford a written statement in reference to it. He was cross examined as to what he had told Rutherford and on redirect examination, counsel for appellee asked him what Rutherford had said. The witness replied "He told me he represented some insurance company: I forget which." Thereupon appellant's counsel made an objection and moved to withdraw a juror. The motion was argued out of the presence of the jury and denied by the court. The jury was returned into open court and appellee's counsel again asked the witness what Rutherford said to him and the witness stated, "He just said he would like to have a statement of that accident. He represented some in-

testified that at a point from fifty to one hundred fifty feet west of the entrance to the Aven Hotel, Appellee claimed he was going about 20 miles an hour and that the bus stopped suddenly; that he attempted to stop his car but it skidded, and in order to avoid striking the bus, he turned his car to the left to go around it; that a car coming from the opposite direction responded to him at about the same time; that while he was attempting to go around the bus, the rear end of his car collided with the bus and the front end of his car was struck by the car coming from the east. It is further claimed by Appellee, and he so testified, that the left wheels of the bus at the time it stopped were from eight inches to a foot north of the center line of the highway. Appellee's testimony that the bus stopped suddenly was corroborated by one or two other witnesses. On the other hand the operator of the bus and a number of the passengers testified that the bus did not come to a sudden stop but stopped gradually and that all the wheels were north of the center line of the pavement. The facts in the case were in dispute and should have been fairly submitted to the jury.

During the trial of this case, J. G. Matheson was called by Appellee and testified that he witnessed the collision and had given a Mr. Matheson a written statement in reference to it. He was cross examined as to what he had told Matheson and on redirect examination, corrected his original statement. Matheson had said, "The witness testified that the bus stopped some distance away; I forgot where." Matheson's counsel made an objection and moved to withdraw the testimony. The motion was argued out of the presence of the jury and denied by the court. The jury was returned into open court and Appellee's counsel again asked the witness what Matheson had said to him and the witness stated, "The fact is he said that to have a statement of that accident." The objection was in-

insurance company. I forget the name of that." Appellant's objection and motion to withdraw a juror were again made and the motion denied, after which appellee's counsel said to the witness "Go ahead, what else?" The witness again replied, "He said he represented the insurance company and he would like to have a statement of that accident that he understood I witnessed."

The witness, Clarence Savoie, was cross examined by counsel for appellee and was asked when he next thought about the collision after its occurrence. He replied, "I guess when the insurance fellows come and asked me about a statement about the accident." Appellant's motion was again made and over-ruled. No instruction was given by the court or asked by appellant directing the jury to disregard the statement with reference to Rutherford's being connected with an insurance company, or of the statement of the witness, Savoie. Neither was the jury admonished orally by the court to disregard such statements. After the court had refused to withdraw a juror and order a mistrial, it was the duty of counsel for appellant to tender the court a written instruction to the jury to disregard the testimony complained of. We do not hold that the giving of such an instruction would in every case remove the error committed or cure the injury done. We can conceive of cases where mere reference to the fact that a party is protected by insurance should not be deemed reversible error, and where an instruction admonishing the jury to disregard such fact would be sufficient to prevent injurious results. But this is not such a case. Here the facts were sharply contested and we are unable to say what the verdict would have been in the absence of a suggestion wrongfully lodged in the minds of the jurors that defendant was protected by an insurance company. Although as a matter of good practice, counsel for appellant should have tendered an instruction to disregard the testimony in question, still, there would have been no need of

... I forgot the name of that. Appellant's
on and motion to withdraw a letter was granted and
the motion denied, after which appellant's counsel said to the
witness "Go ahead, what else?" The witness again replied, "I
said he represented the insurance company and he would like to
make a statement of that accident and he represented I witnessed."
The witness, Clarence Saville, was then examined by
counsel for appellee and was asked when he next thought about
the collision after its occurrence. He replied, "I guess about
the insurance follows come and asked me about a statement about
the accident." Appellant's motion was again made and overruled.
His instruction was given by the court or called by appellant.
directing the jury to disregard the statement with reference to
Appellant's being connected with an insurance company, or of
the statement of the witness, Saville. He said that the jury re-
maind orally by the court to disregard such statement. After
the court had refused to withdraw a letter and order a retrial,
it was the duty of counsel for appellee to object and move
written instruction to the jury to disregard the statement and
motion of. He did not do so and the court was not instructed
would in every case remove the error committed on error and the
court. We can conceive of cases where there is no error in the
that a party is protected by insurance should not be deemed to
verbal error, and such an instruction recommending and that to
disregard such fact would be sufficient to prevent the error from
being. This is not even a case. Some one has said that
contested and we are unable to say what the result would have
been in the absence of a successful motion to set aside the
ruling of the court and the statement was made by an insurance
company. Although as a matter of fact, the witness, Saville, was
appellee's motion was overruled and the jury was directed to
disregard the statement, still, it is not clear that the jury

an instruction if the court had granted the motion to withdraw a juror and had continued the cause. In refusing to grant the motion we think the trial court erred. (McCarthy v. Spring Valley Coal Co. 232 Ill. 473; Bishop v. Chicago Junction Ry. 289 id. 63; Ruwisch v. Knoebel 233 Ill. App. 526; Turner v. Lovington Coal Co. 156 id. 60.)

Counsel for appellee claims that there were three parties involved in the collision, to-wit: appellee, appellant, and Norman Hagel, owner of the car which came from the east, and that it does not appear whether the agent of the insurance company was representing appellant, appellee, or Hagel. Hagel was not a party to this litigation and we are of the opinion, from an examination of the record, that the probable effect of the testimony complained of was to impress the jury with the belief that appellant was protected by liability insurance. Counsel for appellee further claims that Garrison had testified to a part of a conversation with Rutherford and that it was competent for appellee to draw out the entire conversation. He asserts that the statement of Garrison was a surprise to him and that he did not even suspect an insurance agent had interviewed Garrison. We give full credit to such assertion, but it can furnish no excuse for apparent willingness to elicit repetitions of such testimony over the objection of appellant's counsel. . .

The only instruction given on behalf of appellee had to do with the section of the statute relating to the sudden stopping or slowing down of a motor vehicle without first signalling with outstretched arm or otherwise to those following closely in the rear. We have examined it and while not carefully drawn, it contains no reversible error. As this cause must be remanded for another trial, it is unnecessary to express an opinion as to the other matters complained of by appellant.

of the Golden Gate Bridge and the Golden Gate Park.

of selected FBI agents and permitted him to view the files of those

(Continued) . . .

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James v. James; 88. 10. 1917. 10. 1917.

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RE NORMAN HAZEL, owner of the car which came from the 1000,

and that it does not appear whether the agent of the insurance

Содержание

was not a party to this litigation and we do not object.

from an examination of the record, that the probable effect

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The belief that appeal was protected by liberty interest.

Counsel for appellee further claims that Garfield has testified

to a part of a conversation with the defendant, who had been arrested on 11/11/68.

competent for application to draw out the active constituents. In

IN AN EFFORT TO MAINTAIN THE STRENGTH OF THE UNION

and that he did not even suspect an interview had taken place.

10. The following is a list of the names of the persons who have been admitted to the membership of the Society since the last meeting of the Council.

Victims of such violence are urged to call 901 333-3333 or 901 333-3333 if

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The only instruction given on this subject is:

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1. The first model is a simple linear regression model, which assumes that the relationship between the variables is linear. This model is the simplest and most commonly used in regression analysis.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

For the reasons above set forth, the judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

The first section of the report is devoted to a general
description of the country and the climate. The second section
contains a list of the principal towns and villages.

The third section contains a list of the principal
rivers and lakes. The fourth section contains a list of the
principal mountains and hills.

The fifth section contains a list of the principal
ports and harbours. The sixth section contains a list of the
principal roads and railways.

The seventh section contains a list of the principal
industries and occupations. The eighth section contains a list of the
principal religious and educational institutions.

The ninth section contains a list of the principal
public buildings and monuments. The tenth section contains a list of the
principal public works and improvements.

The eleventh section contains a list of the principal
public institutions and societies. The twelfth section contains a list of the
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public institutions and societies. The twentieth section contains a list of the
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The twenty-first section contains a list of the principal
public institutions and societies. The twenty-second section contains a list of the
principal public works and improvements.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

246 I.A. 631⁵

BE IT REMEMBERED, that afterwards, to-wit: On
DEC 22 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Truman Adelbert Abbott,
Appellant,

v.

Samuel Wilson, et al,
Appellees,

Jones J.

Appeal from the Circuit Court
of McHenry County.

This is an appeal by Truman Adelbert Abbott from a decree of the circuit court of McHenry County; The facts involved are very voluminous. The original transaction which forms the basis of this proceeding took place in 1913. Appellant was then the owner of a farm in McHenry County. He conveyed it by warranty deed to J. H. Marks, who executed two promissory notes payable to himself and delivered them to Abbott. One of the notes was for \$12,000 and the other for \$8,000; both were due ten years after March 1, 1914 and were endorsed as follows:- "Pay to the order of T. A. Abbott--J. H. Marks." Each note recited that it was secured by a trust deed to Fremont Hoy, trustee. To secure the payment of the notes and their attached interest coupons, Marks and his wife, executed and delivered a trust deed covering said lands to Fremont Hoy, as trustee. Abbott and Hoy were well acquainted with each other. Hoy was a banker in the City of Woodstock. The interest on the notes was collected through his bank. Subsequently Hoy and his son, Clarence, started a private bank in the city of McHenry in the same county. Abbott continued to do business with Fremont Hoy at the bank in McHenry and had a safety-box there in which he placed his securities. When the interest coupons matured, he cut them off and left them with the McHenry Bank for collection. When they were collected they were credited to Abbott's account.

About the year 1920 Marks sold the farm to his son-in-law. Abbott conferred with Hoy regarding his securities and the evidence is somewhat conflicting as to what took place

Appeal from the Circuit Court
of McHenry County.

THOMAS HARRIS vs. JAMES H. HARRIS.

James H. Harris, Plaintiff,
vs. Thomas Harris, Defendant.

Page 1.

This is an appeal by Thomas Harris Abbott from a
verdict of the circuit court of McHenry County; the facts in-
volved are very voluminous. The original transaction which
forms the basis of this proceeding took place in 1881. Ap-
pellant was then the owner of a farm in McHenry County. He
conveyed it by warranty deed to J. M. Harris, who executed two
promissory notes payable to himself and delivered them to
Abbott. One of the notes was for \$12,000 and the other for
\$8,000; both were due ten years after March 1, 1912 and were
endorsed as follows: "Pay to the order of J. M. Harris--J. M.
Harris." Each note recited that it was secured by a trust deed
to Fremont Hoy, trustee. To secure the payment of the notes
and their attached interest appraisers, James H. Harris, de-
fendant and delivered a trust deed covering said lands to Fremont
Hoy, as trustee. Abbott and Hoy were well acquainted with each
other. Hoy was a banker in the city of Chicago. The interest
on the notes was collected through his bank. Subsequently Hoy
and his son, Clarence, started a bank in the city of
McHenry in the same county. Abbott continued to do business
with Fremont Hoy at the bank in McHenry and was a partner in
the same in which he placed his investments. When the interest
coupons matured, he cut them off and left them with the McHenry
bank for collection. When they were collected they were delivered
to Abbott's account.

About the year 1920 Harris sold the farm to his son--

in-law. Abbott continued with Hoy regarding his investments

and the subsequent collection of the coupons was made by the

between Hoy and Abbott. Hoy testified that Abbott requested him to buy the securities but he refused to do so because of the lack of sufficient money; that Abbott then suggested that Hoy's bank make the purchase; that Hoy declined this proposition because the bank was about to be reorganized and the total of the notes would be more than the bank would be authorized to loan to any individual; and that Abbott then said that he (Abbott) would transfer the securities to Hoy, if Hoy would give him his note therefor which could be paid as the latter collected the money on the Marks notes. Thereupon on August 20, 1920 the following contract was entered into between Abbott and Hoy: "This agreement witnesseth that whereas T. A. Abbott of the Village of Ringwood, McHenry County, Illinois, has this day sold, assigned and delivered to Fremont Hoy of the city of Woodstock, County of McHenry and State of Illinois for the price and consideration of Twenty Thousand Four Hundred Fifty Five and 60/100 Dollars, which is the present worth for both principal and interest of a certain Trust Deed together with two notes, one of which is for ^{the} sum of Twelve Thousand (\$12,000), and the other for the sum of Eight Thousand (\$8,000) Dollars, both of which notes are secured by said Trust Deed, with a priority created in favor of said note in the sum of Twelve Thousand (\$12,000) Dollars, said Trust Deed being a first lien upon a farm sold by the said T. A. Abbott to one J. H. Marks, which farm consists of about Three Hundred Seventy Five (375) acres of land in the Townships of McHenry and Greenwood, McHenry County, Illinois.

"Said sale, assignment and delivery of said securities is with the intent to actually and in fact convey to said Fremont Hoy full and complete authority to enforce all of the terms and conditions of said Trust Deed and notes as fully as could be done by the said T. A. Abbott.

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"It is hereby agreed that the settlement by the said Fremont Hoy shall be made in the manner and at the times hereafter stated, viz: When any interest payments evidenced by said securities fall due and are paid, such amount shall be immediately paid over to the said T. A. Abbott; that when the principal of either or both of said notes falls due and is paid, such amounts or any portion thereof which may be paid upon them from time to time shall be paid over to said T. A. Abbott, less, however, any necessary expenses including attorney's fees and court costs that said Fremont Hoy may find it necessary to incur or expend in connection therewith. It is expressly understood that certain irregularities are found to exist in the securities above mentioned. This agreement shall extend to and be binding upon the heirs, executors, administrators, * * * * * of both parties hereto."

On September 30, 1920, Fremont Hoy sold the notes to appellees, Samuel Wilson and his son Clifford Wilson. Samuel Wilson purchased the \$12,000 note and Clifford Wilson the \$8,000 note. At the time these securities were purchased by the Wilsons, the principal notes and the coupon notes had been endorsed by Abbott in such form as to pass title by delivery and the record discloses that Hoy told Samuel Wilson that he had purchased them. There is no evidence in the record that either of appellees ever saw the assignment contract above set out or had any knowledge of its existence. Subsequent to the assignment, the Wilsons collected all interest which was paid on the notes. In the Spring of 1921, Maude Clark, a daughter of Abbott, came to Hoy and said that she had heard her father was going to be married and requested Hoy to do what he could to have him turn over some of his property to her and her children before he was married. Hoy declined to take the matter up with Abbott unless the latter approached him on the subject. A little later Abbott came to Hoy and stated he was

It is further stated that the settlement of the said
Tremont was made in the manner and at the times above-

stated, and that when any interest was received by

the said Tremont, such interest was paid to the said

Abbot, and that when the said Tremont was paid over to the said T. A. Abbot, such when the

principal of either or both of said notes falls due and is paid,

such amount is to be paid to the said T. A. Abbot, from

time to time shall be paid over to said T. A. Abbot, from

the said interest received by the said Tremont, and

it is further stated that said Tremont may find it necessary to in-

cur or expend in connection therewith. It is expressly under-

stood that certain responsibilities are to exist in the

connection with the said Tremont, and that the said Tremont

shall be binding upon the heirs, executors, administrators,

and assigns of both parties hereto."

On September 30, 1930, Tremont was paid the notes to

appellants, Samuel Wilson and his son Clifford Wilson. Samuel

Wilson purchased the \$12,000 note and Clifford Wilson the

\$8,000 note. At the time these securities were purchased by

the Wilsons, the principal notes and the coupon notes had been

delivered by Abbot in such form as to give title by delivery

and the record discloses that they both Samuel Wilson and his

son Clifford Wilson had been paid the money. There is no evidence in the record

that either of appellants ever saw the securities concerned above and

that either had any knowledge of the delivery. Therefore to the

fact, the Wilsons obtained all interest which was due

on the notes. In the spring of 1931, when the said Wilsons

of Abbot, came to pay the notes and when the said Wilsons

was going to be mailed and no record was to be made of the

to have him turn over some of his property to pay the

children before he was married. Not satisfied to take the

matter up with Abbot, Wilson and his son Clifford Wilson

subject. A little later Abbot came to pay and stated he was

going to be married the next day and desired to make a will so that he could give some property to his daughters. Hoy told Abbott the marriage would invalidate the will and none was drawn. On the same day Abbott made an assignment to his daughter of an undivided three-fifths interest under the said above mentioned agreement between him and Hoy, and also made an assignment of his remaining two-fifths interest under said agreement to his grandchildren, the children of his said daughter. These assignments were delivered to the daughter that evening.

On May 1st, 1923, V. S. Lumley, then state's attorney of McHenry County, filed a bill on behalf of Abbott against Samuel Wilson and J. H. Marks. Clifford Wilson was not made a party. By this bill, Abbott sought to have the notes and trust deeds impounded and Samuel Wilson restrained from transferring them. The bill alleged that Abbott had never transferred the securities to anyone; that they had been obtained from him by Fremont Hoy through fraud and trickery; and that Samuel Wilson was in fraudulent collusion with Hoy. Wilson answered the bill denying any wrongdoing and alleging that the securities were purchased from Fremont Hoy for full value and in due course. During the May term, 1923, of the circuit court of McHenry County, Fremont Hoy and his son, Clarence, were indicted for the confidence game, the charge being based upon the claim of Abbott. C. P. Barnes, as solicitor for Samuel Wilson, filed an answer to Abbott's bill of complaint. In November 1923, Lumley, Abbott's solicitor and also state's attorney, in charge of the criminal proceedings against the Hoys, was paid \$150 by Wilson's said solicitor and dismissed Abbott's bill of complaint. The Hoys were tried, (a second indictment having been returned against them to take the place of the former one), convicted of the confidence game, and sentenced to the penitentiary.

After the Hoys had been convicted and placed in prison, a number of facts concerning this whole matter was

called to the attention of the presiding Judge of the McHenry County Circuit Court. Among them was a certain letter of October 20th, 1923, from the said C. P. Barnes to W. L. Pearce, an attorney for the Hoys in the criminal case. This letter stated that the writer, Barnes, knew from the facts he had "dug up" that it would be impossible for the State to convict the Hoys and expressed a willingness to render aid to the attorneys for the Hoys, if he could obtain the hearty cooperation of the Hoys and their attorneys in the chancery proceedings against Wilson. The presiding Judge was also apprised of the payment of \$150 to Lumley and of his dismissal of Abbott's suit against Wilson. He also learned that Samuel Wilson had paid \$2800 as fees to his solicitors. In view of the matters thus presented, the court was evidently of the belief that Abbott may have been cheated out of his securities and wrongfully deprived of an opportunity to obtain redress in the courts. Accordingly the court on its own motion vacated and set aside the order dismissing Abbott's suit and reinstated the cause upon the docket.

Barnes, by letter, protested against the court's action in this behalf and shortly thereafter notified the Wilsons that he would no longer appear for them in the suit. In this acute situation the court appointed Judge R. K. Welch as amicus curiae with power to do whatever might be necessary to fully protect the rights of each of the parties to the cause. Judge Welch accepted the appointment and subsequently made a written report in which he found that Abbott had been defrauded by Fremont Hoy and that no title to the securities passed to Hoy.

It appears that the Wilsons, during all this time, believed Abbott had told the truth on the trial of the criminal case, and because of that belief they entered into a contract and stipulation for a dismissal of Abbott's suit and a compromise of their claims to the securities in question. Under the

compromise agreement they agreed to accept less than \$5,000. The only parties to the contract of settlement and stipulation were Abbott, Samuel Wilson and Clifford Wilson. Neither Maude Clark, her children, nor the guardian for those who were minors were parties to it. In order to protect the security and to proceed to the collection of the indebtedness and in the interest of all parties concerned, a receiver was appointed by the court to take over the securities. He instituted foreclosure proceedings and obtained a decree for foreclosure and sale. A portion of the decree was later modified by agreement of the parties.

After the settlement stipulation was entered into and Abbott's suit had been dismissed, the Wilsons came into possession of information which convinced them that the testimony given by Abbott on the trial of the criminal case against the Hoys and his statements to the Wilsons concerning his transactions with Fremont Hoy were wilfully and knowingly false. Samuel Wilson then filed a bill of review and cross bill, in which he alleged that he had been induced to enter into the settlement agreement through the deceit and misrepresentations of Abbott; that Abbott had knowingly and for a good consideration transferred said securities to Fremont Hoy, and that Hoy's transfer of the same to the Wilsons was valid. He prayed that the settlement agreement be cancelled and held to be void. Abbott filed an answer denying the said allegations. Upon a hearing, the court entered a decree finding that Abbott's original bill against Wilson is without equity and should be dismissed; that the matters set up in Wilson's answer and cross bill, as above mentioned, have been proven and are true; that the Wilsons had valid title to said notes and trust deed and that they are entitled to the net proceeds in the hands of the receiver arising from a redemption which had been made of the mortgaged premises. The decretal order followed the findings and from this decree an appeal is prosecuted.

We have examined the record and we agree with the findings of fact as made by the chancellor. The above statement can leave no doubt of the court's right and duty to set aside the dismissal order and to reinstate the cause. The order modifying the decree of foreclosure and expunging certain matters from that decree was entered by and with the consent of all the parties including appellant and he has no right to object to it now.

The decree is correct in ordering a cancellation of the settlement agreement. The Wilsons were misled by Abbott in entering into it and acted under an honest belief that Hoy had defrauded Abbott and had obtained the securities by means of the confidence game. The alleged compromise was a result of Abbott's fraud and can avail him nothing.

It is claimed that appellees were not holders in due course because they had notice that Hoy was trustee in the trust deed given to secure the notes in question. Numerous authorities are cited in support of the proposition that parties dealing with a trustee must take notice of all the rights of the cestui qui trust. Such is undoubtedly the law. But in this case, Hoy's trusteeship was terminated by the act of Abbott in assigning the securities to Hoy on August 20, 1920 and the rules of law here sought to be invoked has no application. The notes were made by Marks to his own order, endorsed by him to Abbott, and then endorsed by Abbott in blank. Hoy was not claiming to be the trustee for Abbott. He claimed to be the purchaser and owner of notes. Abbott had endorsed them and had clothed Hoy with every indicia of ownership. He who takes negotiable paper before due for a valuable consideration without knowledge of any defect in the paper and in good faith, holds it by title valid against the world. Suspicion of defect of title or knowledge of circumstances, which would excite such suspicion in the mind of a prudent man, or gross

negligence on the part of the taker at the time of the transfer will not defeat his title. That result can only be produced by bad faith on his part. (Mann v. Merchant's Loan & Trust Co. 100 Ill. App. 224; Bemis v. Horner 165 Ill. 347; Kavanagh v. Bank of America 239 id. 404; Section 56 of the Negotiable Instruments Act.) Negotiable instruments endorsed in blank pass by mere delivery and when such paper is offered for sale, the person taking or purchasing it is not bound to inquire as to the title of the holder, unless he has notice or knowledge of facts which on inquiry would lead to notice of defect in the title, and such notice or knowledge must be of that character which if not observed would furnish the foundation for the charge of bad faith on the part of the purchaser. (Morris, executrix, v. Preston 93 Ill. 215; Mann v. Merchants Loan & Trust Company, supra; Bippus v. Vail 230 Ill. App. 636.)

It is claimed that under the provisions of the Negotiable Instruments Act the title of Hoy to the securities was defective and that the burden is on the Wilsons, as holders, to prove that they acquired title in due course. Section 52 of the Negotiable Instruments Act defines a holder in due course as a holder who has taken the instrument under the following conditions: (1), that the instrument is complete and regular upon its face, (2) that he became the holder of it before it was over due and without notice that it had been previously dishonored, if such was the fact, (3) that he took it in good faith and for value, and (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. We think the evidence shows conclusively that appellees were holders in due course of the instruments in question and that at the time they bought the notes all the essentials mentioned in Section 52 of the Negotiable Instruments Act were present. Whatever the relations may have been between Abbott and Hoy, there was nothing about the

instruments to indicate there was any defect in Hoy's title. If one of two innocent persons must suffer a loss, he who contributes to it or enables another to commit a wrong must bear it. (Gavagan v. Bryant 83 Ill. 376; Cold Storage Co. v. Bankers' National Bank 176 id. 260.)

The chancellor did not err in appointing the present state's attorney of McHenry County to represent Samuel Wilson, without fee or reward. It is urged that Judge Welch, amicus curiae in this cause, became the partisan representative of the Wilsons during the hearing of the case. The criticism is not warranted. The record shows that when he filed his report, he was of the opinion that Abbott had been wronged. Later he learned of Abbott's duplicity and took the only course open to him. He advised the court of his error and used his efforts to see that the Wilsons received that justice which belonged to them.

The issue is clearly defined and the only question about which this court is concerned is whether the Wilsons or Abbott is entitled to the proceeds of the notes in question. Whatever may be said relative to the dealings between Abbott and Hoy, Abbott placed the power in the hands of Hoy to pass a good title to the securities in question. The notes were negotiable and under the law the Wilsons took good title to them. In the trial of the Hoy's on the criminal charge, Abbott testified that he had never endorsed the notes or executed the assignment contract. At other times he admitted he had done so, and the record in this case shows that he did both understandingly. Little credence can be given to his testimony.

We find no substantial error in the record. The decree of the chancellor is correct and it is accordingly affirmed.

Decree affirmed.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

246 I.A. 632¹

BE IT REMEMBERED, that afterwards, to-wit: On

DEC 22 1927 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

Harold Shear, Appellee,

v.

Appeal from the Circuit Court
of Kankakee County.

Illinois Central Railroad Company,
Appellant,

Jones J:

Harold Shear, appellee, recovered a judgment against the Illinois Central Railroad Company, appellant, for \$1800, on account of personal injuries received by him through the alleged negligence of the appellant. There is but one count in the declaration. The facts relied upon for recovery in this case are the same as in Corlett v. Illinois Central Railroad Company, 241 Ill. App. 124. The main difference between these cases is that Corlett was the driver of the car at the time of the accident while Shear was riding in the car at the invitation of Corlett. After the Corlett case was decided in this court, a petition for certiorari was filed in the Supreme Court. The petition was denied; therefore the judgment of this court in that case is final.

The trial court gave only one instruction on behalf of appellee. It told the jury "If you believe from the evidence that the plaintiff was the guest in the automobile of Robert Corlett at the time of the accident, at the invitation of said Robert Corlett and that he was without any authority to direct or in any manner control the conduct of the driver of the automobile, and if you further believe from the evidence that just before and at the time of the accident the plaintiff was in the exercise of ordinary care for his own safety, then the negligence of the driver of the automobile, if any, could not be chargeable to the plaintiff." Appellant insists the giving of this instruction was reversible error and relies upon *Opp v. Pryor* 294 Ill. 538. In that case the giving of a similar instruction was held to be reversible error because the plaintiff stated that she did not pay

United States, Appellate,

Appeal from the District Court
of the Eastern District

Illinois Central Railroad Company
Appellant,

vs.

Harold Thont, Appellee, Respondent & Defendant.

The Illinois Central Railroad Company, Appellant, has filed

an account of personnel injuries received by him through the

alleged negligence of the Appellant. There is one other

in the declaration. The facts relate upon the recovery in this

case are the same as in Case No. 1, Illinois Central Railroad

Company, Vol. III, App. 112. The main difference between these

cases is that in this case the Appellant is not the same as in Case No. 1.

The Appellant in this case is the Illinois Central Railroad Company.

At Chicago, Ill., the Appellant was notified on June 1, 1911,

that the Appellant was liable for the injuries sustained by the

Appellant and that the Appellant was liable for the injuries sustained by the

Appellant and that the Appellant was liable for the injuries sustained by the

The trial court gave only one instruction on behalf

of Appellee. It said the jury "if you believe from the evidence

that the Plaintiff was the Agent of the Appellee at Chicago

at the time of the accident, and the Appellee at Chicago

Robert Corbett and that he was negligent and responsible for the

of in any manner control the conduct of the Appellant at the time of

accident, and if you believe from the evidence that the

before and at the time of the accident the Plaintiff was in the

exercise of ordinary care for his own safety, and the Appellant

of the Appellant, it is the duty of the Appellant to be responsible

to the Plaintiff." Appellate Judge in Case No. 1, Illinois Central Railroad

and Appellee and that the Appellant was liable for the injuries sustained by the

in this case the Appellant is the Illinois Central Railroad Company and the

Appellee is the Appellant and the Appellant is the Appellee and the Appellee is the Appellant.

any attention, but depended and relied entirely upon the competency of the driver of the car. She had signed a statement declaring she did not know at the time of the accident that there was a train approaching; that she considered the driver of the car thoroughly competent and relied entirely upon her; and that as she approached the crossing she did not make an effort to look or listen for trains. On the trial she said she did not remember anything about the collision, but admitted that she left the driving and management of the automobile entirely to the driver and did nothing herself in connection with it. It appeared on that case that the plaintiff sat at the right of the driver on the front seat and had an equal opportunity with the driver to observe danger from the approach of a train. In the exercise of ordinary care for her own safety, it was no less her duty than that of the driver to observe danger and if in the exercise of that duty she did observe danger, then it became her duty to warn the driver. In view of the evidence in that case, the court held the instruction was wrong.

In this case the uncontradicted testimony tends to show that appellee did not know appellant had made an excavation across the highway where the accident occurred; that while he knew appellant's railroad track and the interurban track ran north and south across the highway at some point, he did not know where they crossed the highway and did not know they were approaching that point; that he was sitting on the right hand side in the rear seat of the automobile; that the car was travelling about twenty miles an hour; and that he was watching the highway looking straight ahead and observed nothing to warn him they were approaching a railroad crossing. There is nothing in this record to show that appellee was negligent in any way, but the weight of the evidence discloses that he was in the exercise of due care for his own safety. The instruction in this case is not subject to the

any attention, but depended and relied entirely upon the competency of the driver of the car. She had signed a statement claiming she did not know at the time of the accident that there was a train approaching; that she considered the driver of the car sufficiently competent and relied entirely upon him; and that she approached the crossing and did not make an effort to look or listen for trains. On the trial the state called and produced testimony that the defendant, who testified that she had no driving and management of the automobile initially to the driver and his handling thereof in connection with it. It appeared in this case that the plaintiff was at the right of the driver on the front seat and was in a position of opportunity with the driver to observe danger from the approach of a train. In the exercise of ordinary care for her own safety, it was so far her duty than that of the driver to observe danger and if in the exercise of that duty she did observe danger, then it became her duty to warn the driver. In view of the evidence in this case, the court held the instruction was proper.

In this case the undisputed testimony seems to show that appellee did not know appellant had been in the car while he knew appellant's railroad track was the last time, track ran north and south across the highway at road point. He did not know where they crossed the highway and did not know they were approaching that point; and he was sitting on the right hand side in the rear seat of the automobile; and the car was travelling about twenty miles an hour; and that he was watching the highway closely, and that he was served nothing to warn him and was approaching a railroad crossing. There is nothing in this record to show that appellee was negligent in any way, but was warned of a train approaching that he was in the exercise of due care for his safety. The instruction in this case is not correct.

objections made to the instruction condemned in *App v. Pryor*, *supra*.

The declaration charged that the defendant did not maintain a barrier of any kind or nature to prevent an automobile while being driven along said public highway from plunging off of it and into the excavation. The evidence showed that a fence was there but that it was out of repair. Appellant asked the court to instruct the jury that unless the plaintiff proved by a preponderance of the evidence that there was no fence of any kind or nature east of the excavation, they should find the defendant not guilty. There was no variance between the charge of the declaration and the proof. This claim of variance was made and settled adversely to appellant's contention in the *Corlett* case. The refusal of the instruction was not error. Defendant's instructions 5 and 11 properly presented the law with reference to the existence of a barrier.

Counsel for appellee is charged with having made improper remarks in his argument before the jury. An examination of the record shows that no objection was made to any part of the argument either by the attorney for appellant or by the court. Alleged improper argument is not assignable for error, unless objection is made at the time of the argument. If no such objection is made and exception preserved, it will not be considered in this court. (*Illinois Central Railroad Co. v. Cole* 165 Ill. 334; *Brant v. C. & A. R.R. Co.* 294 id. 606; *Quincy Gas and Electric Co. v. Baumann* 203 id. 295.) Counsel is also charged with improper conduct during the examination of witnesses, to which objections were made and sustained by the court. The jury was instructed in each instance to disregard the matters complained of. While the conduct of appellee's counsel in that particular was improper, it was not calculated to prejudice the rights of appellant and we think that if such conduct had not occurred, the verdict would have been the same.

testimony was to the instruction contained in Art. V. of the

the instruction changed and the defendant did not

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defendant asked the court to instruct the jury that

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right to witness was made and asked separately to

contained in the United States. The result of the

was not error. Defendant's instruction 3 and 11 properly

presented the law with reference to the witness of a

Counsel for appellee is charged with the duty of

typical matter in his argument before the jury. In

of the record shows that no objection was made to

the argument either by the attorney for appellant or

test. Alleged improper argument is not assigned as error

Alleged objection is made at the time of the argument

In our judgment the damages are not excessive as urged by appellant. The case of Corlett v. Illinois Central Railroad Company, *supra*, is decisive of all the other assignments of error herein. We believe the judgment of the circuit court was right and it is accordingly affirmed.

Judgment affirmed.

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 of the person who is in the same family.

Persons in the family.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Gen. No. 8025

Agenda 13.

OCTOBER TERM, 1926.

Lincoln Park Coal and Brick Co., Plaintiffs in Error.

vs.

Wabash Railway Company, Defendant in Error.

Error to the Circuit Court of Sangamon County.

PER CURIAM:

The action was one in subrogation, arising out of liability under the Workmen's Compensation Act. Charles T. Hale, an employe of plaintiff, was killed while in the course of his employment by being thrown from a coal car by the action of servants of the defendant while switching cars in its yards. An award to his widow was made by the Industrial Commission in the sum of \$3199.04, and is being paid by the plaintiff. It brought suit under the statute to recover the amount of the award. The cause was tried by a jury which found for the defendant. A motion for new trial having been denied, and judgment rendered, plaintiff brings the record to this court by writ of error.

Plaintiff in error is and was at the time the cause of action arose, engaged in the mining of coal. Its mine is not located on a railroad, and its coal was hauled by teams to be loaded into cars of defendant in error. Charles T. Hale was an employee of plaintiff and was in charge of the loading of coal from wagons into coal cars on defendant's switch track designated as No. 4. There were five tracks switching off defendant's main line near Jackson street. Two of these known as No. 2 and No. 4 extend north across Capitol Avenue, the others stopping there. On the occasion of the injury, the coal wagons of plaintiff came on Capitol Avenue, turning south along the east side of No. 4 and west of No. 3. A loaded coal car and one partially loaded were on No. 4.

Hale walked to Jackson street and saw Shadow, the man in charge of defendant's switching operations and asked him if he had any cars for him. Shadow told him there were two empty cars on the cut which was then about half a block South of Jackson street and then coming in on track 4. Hale told him that he had one loaded car to take out, and was told by Shadow the cars were coming right away and to get his teams away. The two cars were "kicked in" on track 4, stopping six or eight feet from the partially loaded car on which Hale was working. The engine was detached from the two empties, and Shadow left them and with the engine "kicked" another car, on which he was riding, onto track 2. The engine was detached and taken back and several cars were pushed onto the track and the two empty cars recently run onto track 4 were "shoved" against the partially loaded car which Hale was working in and he was thrown by the impact under the car and his leg was cut off, from which he died while being taken to the hospital. No one was on the "leading car" that struck the one on which Hale was working.

Shadow says that as he was on the car shoved in on No. 2 "I hollered look out boys they are coming." About that time he climbed down from the car and started back "towards the rest of them." It was a minute or a minute and a half after he "hollered" that the cars bumped. He did not know whether Hale heard him. He gave Shadow no signal, and he did not know whether Hale even looked. He did not see him get up on the car. They did not tell Hale they would come back and push forward the cars on track 4 after they first put them in. Shadow told him after putting the cars in "we are ready to go," and he said he said he couldn't get at them. "I told him we were going to move them in, then we put the two cars in. I didn't tell him anything further." This information was given after the engine had been detached from the two empty cars and while it was engaged in other work.

Defendant in error says the record presents purely a question of fact and that the verdict conforms to the undisputed facts. We cannot assent to this view of the record. A consideration of all of the evidence discloses no disputed question of any fact warranting a recovery. The prominent fact is that the car on which deceased was working when he was killed, was in a place and on a side track set apart for the purpose of loading coal for shipment by plaintiff. It was brought from its mine in wagons and loaded onto cars furnished by defendant for that purpose at a place assigned by it. Deceased was engaged in his employment in loading. He was in the car placing coal and shaping it in the car for transportation. He was one of plaintiff's agents and servants for that purpose and the crew having charge of the cars called for by him knew it. He was not a mere licensee, nor engaged in crossing the tracks, nor an idler nor a trespasser. Defendant, under the circumstances owed him a specific and well defined duty of protection.

It is well before discussing the principles applicable to the undisputed facts to notice the contention of defendant as indicated by the character of cases relied on for affirmance of the judgment. The prominent cases are **C. M. & St. P. Ry. Co. v. Halsey**, 133 Ill. 248 and **C. & N. W. Ry. Co. v. Hatch**, 79 id. 137. Both were crossing cases and the principle of liability differs from that applicable to the situation of Hale in this case as will appear from authorities hereafter cited. The principle applicable in such cases is well expressed in the following excerpt from the **Halsey** case, quoted and emphasized in the brief of counsel for defendant:

"One who, failing to observe due care, blindly walks into danger that the observance of due care would have enabled him to avoid, is no less guilty of contributory negligence than he who, by the observance of due care, could extricate himself from danger fails to make any effort for his personal safety, and because thereof is injured."

The same principle of responsibility was laid down in the **Hatch** case. It was before the Supreme Court for error in the refusal of four instructions offered by defendant. The second refused instruction contained the following clause:

“While it was incumbent upon the railway company to run its train on the occasion referred to, and to give the required signal by ringing the bell for eighty rods before reaching the crossing, it was also the duty of the plaintiffs to look out for the approach of the train, and to observe all reasonable precautions before attempting to cross the railroad track.”

That rule rests upon the relative rights of the respective parties under the particular circumstances. But if the parties sustain a different relation their rights, duties and obligations vary accordingly. In the crossing cases the rights of the parties were the same. Their duties were the same—both were bound to exercise care in using a dangerous place.

Duty is the basis of negligence. If no duty exists, there can be no negligence. **Mammoth v. Worcester Cons. Street Ry.** 228 Mass. 282. It may grow out of relations, as master and servant, carrier and passenger; or out of a situation as where one is upon the premises of another. The duty in the latter condition will vary with the circumstances attending the situation of the parties. A mere invitee, or one upon premises by permission is entitled to demand the exercise of less care for his protection than one rightfully on the premises for business or other lawful purpose. But the terms, duty and negligence having an ethical tinge and characterizing conduct for practical purposes are defined and imposed by law, statutory or common.

The imposed duty resting upon defendant and controlling this case is defined and applied in **C. & N. W. Ry. v. Goebel**, 119 Ill. 515. In that case Hart was engaged in unloading cars of defendant on a side track in its yards. He and a number of other teamsters were employed whose daily duty was to unload and haul coal and other freight from loaded cars standing on

the side-track. The unloading was done by them for the owners of the freight and not the company, with the company's knowledge and consent, and in pursuance of the due course of business at that yard. While Hart was loading his wagon with coal, the car upon which he was standing was suddenly and violently struck by other cars on the side track, set in motion by an engine under the control and direction of the company's servants, causing him to lose his balance and fall between the cars on the track where he was run over and killed. The track was used chiefly for standing loaded cars for the purpose of unloading them by teams. There was judgment for plaintiff below, affirmed by the Appellate Court, and a further appeal took the case to the Supreme Court.

In that case, as in this defendant relied upon the principle of liability in crossing cases citing **C. B. & Q. R. Co. v. Lee**, 68 Ill. 579. The Court by Mr Justice Mulkey answered the contention by saying:

"The circumstances of this and that case are wholly different, and call for the application of a different principle." Having made clear the distinction he laid down the principle applicable to the case then before the court (524):

"When a railroad company puts loaded cars upon a side track for the purpose of being unloaded by the owners of the freight, and such owners, their agents or servants, with the express or implied consent of the company, proceed to remove the freight, the company in such case has no right **without special notice or warning**, to run or back a train in upon the side track while the cars are being unloaded. While, in such case, those engaged in the work of unloading are not permitted to close their eyes or ears to what come within the range of their senses, **yet they may give their undivided attention to their work, and are justified in assuming that the company will not molest them, or render their position hazardous without such notice or warning.** That such is the law, is well settled by authority. **Rolling Mill Co. v. Johnson**, 114 Ill. 57; **Railroad Co. v. Hoffman**, 67 id. 287; **Newson v. New York Central**, 29 N. Y. 383; **Stinson v. Stinson**, 32 id. 333; **Noble et al. v. Cunningham**, 74 Ill. 51; **Thompson on Negligence**, 461; **Pierce on Railroads**, 275, 276."

In **C. & E. I. R. R. Co. v. Crose**, 214 Ill. 202, Crose and a team of horses were killed while loading wood into cars on a side track of defendant. A fast train was late and came through

Milford on the main line at a high rate of speed. Contributory negligence was relied on as a defense. The agent of defendant had assigned to him the place where the loading should be done when he asked for another place. The court say (607):

"It must be inferred from the evidence that he was attempting to unload his wood into the cars at the place of the accident and drove his team in the space between the tracks by the direction of the defendant or its agent, and he therefore had the right to assume that the defendant would not render his position hazardous by any act of negligence on his part. (**Chicago and Northwestern Railway Co. v. Goebel**, 119 Ill. 515). As to his duty to watch and listen for approaching trains, it must be borne in mind that he had the right to presume that such trains would be run with proper care, and also that he and his men were rightfully engaged in unloading the wood at that time and therefore were not bound to exercise that degree of care in looking and listening which would have been required of them had they not been so engaged."

In **I. C. R. R. Co. v. Schultz**, 64 Ill. 172, the plaintiff was injured while unloading coal in substantially the same situation in which Hale was placed. The case was presented to the Supreme Court upon instructions given for plaintiff as to the law as in the cases **supra**, and those refused for defendant upon the question of contributory negligence. Those for the plaintiff stated the rule of responsibility as in the **Goebel** case and they were held to be properly given and those for defendant properly refused. The court say:

"At the time of the injury, appellee was engaged in unloading coal for the Centralia Gas Co., from the car of appellant. He was directed there by the agent of the railway company and had the right to enter the car for that purpose. He would have made slow progress with his work if required constantly to watch for the approach of trains. Under such circumstances the law imposes the duty upon the company to use **all necessary precaution**, and to give proper signals to warn of danger. The servants of the company probably did see, and at all events might have seen, appellee at his work. If warning was given of the approaching train it is extremely improbable that he would have continued his labor, and made no effort to guard himself from great danger."

The authors of a standard treatise on Railroads say:

"Shippers and consignees of freight on railroad premises for the purpose of loading and unloading cars are properly there and are not trespassers, or bare licensees, and the railroad company is bound to use reasonable care to avoid injuring them while so employed. (Citing among many

others, the **Goebel** case). If such persons while so engaged and with negligence on their part, **other than that in attention to their own safety which an absorption in the duties in which they are engaged naturally produces**, are hurt by the negligence of the railway company, they have an action for damages. It is the duty of switch crews with knowledge, or the means of knowledge that persons are unloading cars, to warn them of an intention to switch cars over a track on which their car is placed. These persons do not assume the risk of injuries from this cause." 3 Elliott Sec. 1809 (1921 ed).

See also **I. C. R. R. Co. v. Hoffman**, 67 Ill. 287, where deceased, engaged in unloading wood from cars, was killed while standing on a track in the railroad yards, and no signal given except the ringing of the bell on the engine. It was held the warning was insufficient and the company liable.

We think it is well contended by plaintiff that the two cars having been pushed on the track in the manner shown and left some distance from the working place of Hale, he had a right to assume that the engine would not again come on the track and the cars be thrown against that on which he was working, without giving him special warning of the fact. When Shadow called from track two "Look out boys they are coming," in whatever tone it was said, it was not the warning the law requires for his protection. He says, it is true, that if he was not deaf he could have heard it. But that is only his conclusion. Engrossed in his work he may not have heard it. But if he did hear it, it was not the unambiguous warning he was entitled to when absorbed in the business that placed him rightfully there. Upon the legal principle of responsibility of defendant laid down with unusual unanimity for our guidance, the evidence tends to show that the defendant was negligent and deceased was in the exercise of due care for his safety when killed.

The judgment of the Circuit Court is therefore reversed and the cause remanded.

Opinion Filed
June 29-1927
6232 246 I.A. 63 23
Gen. No. 8035

Agenda 19

OCTOBER TERM, 1926

Israel Sherman, Administrator of the Estate of Max
Sherman, Deceased, Appellee.

vs.

Illinois Traction Co. Appellant.

Appeal from The Circuit Court of Sangamon.

PER CURIAM:

Max Sherman was killed while riding in an automobile owned and driven by David Rubin, about 12:45 a. m., August 5, 1925. A suit was begun by the administration of his estate to recover damages occasioned by his death. The action was originally brought against Rubin and the Traction Company. A declaration was filed averring that decedent was riding as a guest of Rubin and charging that defendant and Rubin so carelessly and negligently conducted themselves, while decedent was in the exercise of due care and caution for his own safety, that the automobile was run into by an electric car of defendant, by which decedent was injured and died. Later two additional counts were filed charging negligence on the part of the Traction Company and of Rubin, by which the automobile and the car of the company were brought into collision and Sherman was killed. In one of the additional counts it was charged deceased was a guest of Rubin and in the other that Rubin was taking decedent to his home. As specific negligence on the part of the company it was charged that in violation of an ordinance of the City of Springfield, the company was running its car at a speed in excess of ten miles per hour and by reason thereof and the negligence of Rubin, decedent was injured and died. On motion of plaintiff the suit was dismissed as to Rubin and the trial was had upon the charges against the company. No amended declaration appears in the abstract after Rubin was dismissed out of the case. There

was a verdict and judgment for \$6000 and defendant appealed.

The collision occurred at the intersection of Laurel and Pasfield streets. The tracks of the company are laid in Laurel street, extending some blocks from the east across Pasfield street. At that point, the street bends toward the northwest to a point west of an alley which is almost midway between Pasfield street and Whittier Avenue. At that point it extends due west, crossing Whittier Avenue at a right angle. There is a property line and a curb line on both sides of Pasfield street, north of Laurel, the distance between the property lines being sixty feet and between the curb lines thirty feet. On the south side of Laurel the same system of platting appears. But Pasfield does not cross Laurel at a right angle. If the street from the north were extended due south across the tracks in Laurel, it would cut about twenty-five feet off of the lot and side walk on its west side. While the street north is thirty feet wide, south it is only twenty-seven. The west curb line south, coincides with the east property line north of the street. To cross the street from north to south an automobile would have to move southwestward. From that point Laurel extends due east.

David Rubin, "another fellow", and the deceased went to Tokio Gardens, about two miles east of Springfield and stayed until a quarter to twelve p. m. They took the "other fellow" home and Rubin started to take Max Sherman home. They were in a Ford coupe, Rubin driving. On their journey they came into Pasfield street at South Grand Avenue. That point is about five blocks north of Laurel street. Rubin testified:

"Going south from Grand Avenue on Pasfield toward Max's home, I was driving and Max was in the car with me. He was in perfect physical condition so far as I know. When we reached Pasfield and Laurel it was about 12:45 a .m. We were going south on the west side of the street, about fifteen miles an hour. Before we come to the crossing, I pushed in the clutch half way; that leaves your gears out, slows up the car, and I looked both ways to see if there was anything coming and I saw nothing coming. I didn't even see

any light or anything. That light on the street corner-street light was the only light there, only light I saw, and I pushed in on my clutch to start across the interesection. That was the only thing that I remember. My motor was running. It makes a little, not a whole lot of noise. When we got to Laurel we were on the west side, of Pasfield. When we started across we were going at an angle, southwest. When we started across, when I pushed on my clutch to start across, I seen something coming, just coming fast is all I remember. When I saw that I was pretty near on the track I couldn't do anything it was coming so fast. That is all I remember. Max was sitting beside me at this time. He did not say anything with reference to operating the car or driving it. The next thing I remember somebody was picking me up on Laurel street. Heard no signal by bell or whistle, they didn't give me any. I heard nothing to warn me of the approach of this car."

On cross examination he admitted he had turned toward the west when the collision occurred and that the car was about ten feet from him when he was "just getting on the track," that he and Sherman were not talking to each other. "Sherman did not say anything to me or I to him from the time we left Grand Avenue until the collision occurred. Sherman did not speak to me and I did not speak to him upon any subject. Tokio Gardens is a dancing floor. We went there to amuse ourselves. We had done that often. We were friends. I was in the habit of carrying him around in my car."

Decedent's home was a short distance south of the intersection of Laurel and Pasfield.

The evidence as to the movement of the electric car consists of the testimony of the conductor and motor man, and of others who heard or saw it after it came into Laurel west of Whittier. Several witnesses heard it coming around the curve. It made a rasping noise and was heard by persons in the immediate neighborhood of the interesection at which the accident occurred. All say it came around the curve slowly and some say it then increases its speed. The two men on the car say so, too. They say they were running at the time of the collision ten miles per hour with the electric headlight shining and the lights in the car all lit. Touching the fact whether the headlight was burning, one witness for the plaintiff says that it was not and two say they do not know; while three for the defendant say it was, and none that it was not. That the inside lights were bright is vouched by six witnesses for plaintiff,

two saying they don't know whether they were lighted or not. Two for defendant say they were.

Most of the witnesses were awakened by the impact of the car and automobile. Some were just retiring. They describe the impact as an explosion in varying expressions to describe its intensity. As to the place of the impact there is no doubt. The automobile going south, coasting, as it approached the intersection, as testified by the driver, without warning as he says, was confronted by a black object on the railway tracks crossing his way. While he says he was on the west side of Pasfield street, others say he was in the middle or more toward the east side. The marks of the tires skidding in the street beginning a short distance north of the tracks, their turning eastward, with water and oil on the north side of the tracks making a trail eastward on the road bed, and some say on the rails, render it highly improbable that they were driving on the west side, intending to cross Laurel. If they, driving as Rubin says, were intending to cross it, if they had proceeded directly across would have run into the sidewalk south of Laurel. If they intended, as they probably did, to keep in Pasfield, it was necessary to make a sharp turn southwestward, crossing the tracks and street obliquely. But if they wished to avoid a sharp turn and make a continuous run in the line of Pasfield from north to south, the acute turn would be avoided by driving in the center or to the eastward of Pasfield. This accounts for the skid marks on the east side of the street. The motorman says when he first saw the automobile it was north and east of him. It was driven on the left side, which was the east side of Pasfield, headed possibly a little west, and at the time the motorman was about the middle of the street. He was in the front end of his car. It was struck on the left front corner by the right side of the automobile. A photograph discloses the mark of the blow and the crushed right side of the hood of

the automobile. It shows the indented form made by the corner of the car. The motorman set the airbrakes and fell off or was knocked off of the stool he was sitting on. Three seconds are required for brakes to take hold. The car stopped at the alley about one hundred and sixty feet east of the east curb line of Pasfield street. The right side of the hood of the automobile was crushed, the right fender and running board pushed up; the headlight of the car knocked off, the grab iron on the left of the car was pushed against the body of the car; the draw bar chain was broken. The draw bar was pushed to the right and the automobile was under the front end of the car. A witness walking west on the track going to his home near by saw the collision and says it occurred "at practically the east curb line of Pasfield on the north side of Laurel." He saw the automobile approaching Laurel at a high rate of speed. It did not check nor slow up to the instant of the collision. He also testified that the gong in the car rang from Whittier street to the time of the collision. It was rung by "stamping on it." The right side of the body of the automobile on which decedent was sitting, as shown by the photograph, was crushed inward. No one disputed the accuracy of the photographs or of the plat of the street and tracks. The physical facts apparently corroborate the testimony of the occupants of the car and of the eye witnesses to the collision.

Whatever averments are in the declaration as to the relation of Max Sherman with David Rubin, the evidence tends to show they were friends; and Rubin was "in the habit" of carrying him around in his car. They were driving as usual. They had been amusing themselves in this way about two nights a week over a period of a year and a half and always traveled the same way. Decedent had not spoken to Rubin since they entered Pasfield street. He lived near and south of the

crossing and knew that on his way home he must pass over it.

The declaration avers in the first count the injury occurred while Sherman was in the exercise of due care and caution for his own safety. The first additional count avers that at the time and place he was in the exercise of due care and caution for his own safety and conducting himself as a prudent man. The second additional count as abstracted, contains no averment as to care. The right of recovery resting upon negligence, it is necessary that the decedent shall have been, at and immediately before his injury, in the exercise of care for his own safety. This element of plaintiff's right to maintain the action, whether prosecuted by the injured party or by his personal representative, is the same. While negligence of the person driving and controlling the movement of the car will not be imputed to the guest; or to one engaged in a common enterprise with the driver, yet the person injured must show by a preponderance of the evidence that he was exercising the degree of care and caution that a reasonably prudent person, under the circumstances, would exercise for his own safety. The legal principle supporting this conclusion as to the requirements of care by the deceased under the circumstances is stated in **Flynn v. Chicago City Ry. Co.** 250 Ill. 460.

The facts in that case were that Flynn, and Cox who owned a horse and buggy, were engaged in a common enterprise of testing the qualities of the horse; that Flynn had driven the horse for a time and Cox had taken the lines. The night was dark, the road south of the tracks rough, and the horse was blind. Three men were in the single-seated buggy, all more or less intoxicated. Mr. Justice Hand said (464-5): "In view of these facts we are of the opinion that it was proper to make proof that the vehicle in which the parties, at the time of the accident were riding, was being driven upon the street in violation of law, which proof would have raised the presumption that all the occupants of the buggy were, as matter of law, guilty of negligence, which negligence, if it was the proximate cause of the injury, would defeat a recovery."

Following the statement of the rule of responsibility of a plaintiff claiming damages for injuries received while in a conveyance with another as in the case at bar, the court cites and quotes copiously from Beach on Contributory Negligence, Elliott on Railroads, and many decided cases from courts of several states.

Among the cases quoted, (page 474), is **Fechley v. Springfield Traction Co.**, 119 Mo. App. 358. Fechley was injured by the collision of a street car with a buggy in which he was riding at the invitation of the owner. The buggy was owned by Pierce, who was driving. The judgment below was for the defendant.

The court affirmed it, saying:: "Appellant himself must have been free from negligence proximately contributing to his injury or he is entitled to no damages, granting that Pierce's fault does not preclude a recovery and that the motorman's fault was a factor in bringing about the casualty. Few, if any, courts have held that an occupant of a vehicle may entrust his safety absolutely to the driver of the vehicle regardless of the imminence of danger or the visible lack of ordinary caution on the part of the driver to avoid harm. The law in this state and in most jurisdictions is, that if a passenger is aware of the danger and that the driver is remiss in guarding against it and takes no care himself to avoid injury, he cannot recover for one he receives. This is the law, not because the driver's negligence is imputed to the passenger, but because the latter's own negligence proximately contributed to his damage. (Citing authorities). Fechley was imprudent in doing nothing personally to insure his safety. The essential fact is that Pierce did not look in time, as Fechley knew or in reason ought to have known. Therefore he should have stopped Pierce or told him to look for a car, or have looked himself,

before they advanced so far into danger. It is impossible, from appellant's own testimony, that he was giving no heed to his safety, but either was relying blindly on Pierce, or for some reason was not aware of the proximity of the tracks."

Dean v. Pennsylvania Railroad Co., 129 Pa. St. 514 (6L. R. A. 143) quoted in the **Flynn** case (479) is opposite. Dean, while crossing the tracks of the company in a wagon without stopping as required by an ordinance, was struck by a locomotive and injured. Fields was the owner of the horse and wagon and was driving. Mr. Justice **Hand**, applying the law to the case before the court, said: "Under the evidence, the negligence of Fields was clear. The court so held, and then inquired: 'But can the negligence of Fields be imputed to Dean?' There then follows a somewhat extended analysis of the authorities holding that Dean was not chargeable with negligence of Fields, when the court, taking up directly the question whether Dean was guilty of negligence concluded: 'Dean knew the locality well. He had crossed the tracks frequently at this point. He knew that a train was due about that time and that he was approaching the railroad track at a fast trot, yet he took no precautions. He was certainly responsible for his own negligence. He sat with his back to the driver, and although he might have seen his danger, he confesses that he did not look. He said nothing by way of warning to Fields, nor did he ask him to stop, to look and listen or to permit him to get out, and the danger was as obvious to Dean as to Fields. The testimony is wholly to the effect that plaintiff committed himself voluntarily to the action of Fields; that he joined him in testing the danger, and he is responsible for his own act.' The case is ruled by **Township of Crescent v. Anderson**, 114 Pa. 643; 6 Cent. Rep. 616. A judgment of non-suit entered by the lower court was affirmed."

The principle so well developed in the **Flynn** case for the first time in this state has been followed in **Opp v. Dryor**, 294 Ill. 538, under somewhat different circumstances; **Griffenhan v. Chicago City Ry.** 299 id. 590; **Pienta v. Chicago City Ry.** 284 id. 246; **Greenstreet v. A. T. & S. F. Ry.**, 234 Ill. App. 339(and other cases cited in appellant's brief). A recent discussion of the duty of an invited passenger in an automobile, to look and listen, and that his failure to do so or exercise other caution conducive to safety is such contributory negligence as to bar recovery is found in **Parramore v. D. & R. G. W. R. Co.**, 5 Fed. (N. S.) 912, by the Circuit Court of Appeals 9th Circuit. Parramore was riding in an automobile by invitation of the owner and driver. While so

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...the fact that the ...

riding across the tracks of the railroad company in front of a moving engine he was struck and killed. The trial court directed a verdict for the defendant at the close of all of the evidence. The ground for the direction was the failure of Parramore to look and listen for trains and engines on the tracks in front of him approaching from the north, the side on which he was riding in the car, the evidence showing, as in this case, that he did nothing. Overruling the contention of appellants that the guest owes no duty to look, listen or act to avoid collisions at railroad crossings, the court said:

“This question has been repeatedly and exhaustively considered and discussed by the court, and its conclusion has been and still is, that the general law and the more reasonable rule is that a person riding without paying compensation in an automobile, or other vehicle, on invitation or consent of the owner or driver of the car or his agent, is charged with the duty to look, listen, watch and act with reasonable care to prevent collisions, deaths, injuries and accidents at the crossings of railroads and other places in the vicinity of railroads, and that his failure to do so is culpable negligence for which he is liable if it causes or contributes to cause such a collision or death.”

If the rule is applicable to the injuries of one who is the guest in a horse drawn vehicle where control is more complete, it applies with at least equal force to one who is the guest in a motor driven vehicle, operated in a city on a paved street at a speed of from fifteen to eighteen miles an hour.

Taking into account the requirements of due care on the part of the plaintiff's intestate as defined by the decision referred to, we are forced to the conclusion that the preponderance of the evidence contained in the record does not show that the plaintiff's intestate was in the exercise of due care for his own safety at the time of and just before he was killed in the collision with the Traction car of the appellant; the judgment is, therefore, reversed and the cause remanded.

6233u

246 I.A. 631²

General No. 8067.

Agenda No.7.

APRIL TERM, 1927

The People of the State of Illinois, Defendants in
Error,

vs.

Thomas Kelley, Plaintiff in Error.

Error to the County Court of McDonough County.
SHURTLEFF, P. J.

Plaintiff in error was convicted and sentenced on one count of an information in the County Court of McDonough county, charging the unlawful sale of intoxicating liquor. The record is brought to this court for review.

It is assigned as error that the evidence was insufficient to support the verdict and judgment. We have read the testimony and there was the direct evidence of one witness, who testified that he made the purchase from plaintiff in error, which with other attendant circumstances, was sufficient to warrant the jury in returning a verdict of guilty if the jury believed the testimony of the one witness beyond a reasonable doubt, from all the evidence, to be true. **People v. Talbe**, 321 Ill. 92.

In **The People v. Thompson**, 321 Ill. 600, the court held:

"The verdict of a jury on questions of fact will not be disturbed unless palpably contrary to the weight of the evidence. (**People v. Jarecki**, 291 Ill. 80; **People v. Horchler**, 231 id. 566.) Courts are reluctant to substitute their opinion for that of the jury upon controverted questions of fact. To justify this court in reversing on the ground that the evidence was insufficient, it must appear that the finding of the jury is not sustained by the evidence or that it is palpably contrary to the decided weight of the evidence. (**Steffy v. People**, 130 Ill. 98.) A court of review

will not reverse a judgment of conviction in a criminal case unless satisfied there is a reasonable doubt of defendant's guilt. (**Flanagan v. People**, 214 Ill. 170.) A judgment of conviction will not be reversed merely because the testimony is conflicting, but will only be reversed where the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt. **People v. Martellaro**, 281 Ill. 300; **People v. Hohimer**, 271 id. 515."

Plaintiff in error further complains of the giving of the People's first and second instructions. It is contended that each of these instructions contains an assumption of fact. People's first instruction is as follows:

"The Court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendant in this case sold intoxicating liquor as charged in the information without having a permit from the Attorney General to sell the same, and you further believe from the evidence, beyond a reasonable doubt, that the liquor so sold was fit for use for beverage purposes and contained more than one-half of one percent of alcohol by volume, then you should find the defendant guilty as charged in the first and second counts of the information, or either of them, specifying in your verdict the count or counts which have been so proven."

Plaintiff in error contends that by this instruction the trial court clearly assumed the fact that liquor was sold, etc. We do not so understand the purport of this instruction. As the court said in **The People v. Sapp**, 282 Ill. 62, where the same contention was made upon a similar instruction: "We think on a fair reading of that instruction it is not open to either of these objections. The first part of the instruction says, 'if you believe from the evidence, beyond all reasonable doubt,' etc. We think the natural construction of this instruction is that all the rest of the

instruction depended upon this first clause, and that the jury would understand that they must believe from the evidence, beyond all reasonable doubt, all the other things stated in the instruction before finding the plaintiff in error guilty. This being so, there is no merit in any of the criticisms of counsel for plaintiff in error as to this instruction."

What we have said applies also to People's second instruction.

Finding no error in the record, the judgment of the County Court of McDonough County is affirmed.

Judgment affirmed.

6236
246 I.A. 6331

Gen. No. 8077

Agenda No. 13

APRIL TERM, A. D. 1927

William Flint, Appellant,

vs.

J. S. Mundy, Appellee.

Appeal from the Circuit Court of Clark County
SHURTLEFF, P. J.

This suit in assumpsit was brought by appellant against appellee to recover upon a contract entered into between the respective parties for the sale of certain standing timber, owned and sold by appellant to appellee as purchaser on the 28th of January, 1925. The contract was entered into at the First National Bank at Casey, and consisted of a conversation between the parties, at which each claims to have had a corroborating witness present. There was no other contract or conversation between the parties until the logs were cut, measured and the parties attempted a final settlement. The contract substantially covered the timber standing on thirty-five acres and the price was to be ninety-five cents per hundred feet, appellant contending that the measurement was to be "log measure;" that the diameter of the small end of the log was to be measured from bark to bark, the length of the logs taken, and the feet in the logs estimated by "log tally," a log twelve inches in diameter and twelve feet long to be regarded as 144 feet, or the same as twelve twelve-inch boards, while appellee contended that the logs were to be measured by the rule known as "log scale," being "Doyle's Rule" as published in "Scribner's Lumber and Log Book," which rule is: "Deduct four inches from the diameter of the log as an allowance for slab; square one-quarter of the remainder and multiply the result by the length of the log in feet;" and appellee contends that he offered to hand a card, containing this rule and

the measurement results, to appellant, in the Casey Bank, and asked appellant if he understood the rule and that appellant said that he did. Appellee gave a check to appellant at the Casey Bank for two hundred dollars to apply upon the purchase, and marked upon the check, "For all saw timber on Flint Farm north of Ryan Switch at 95 cents per hundred 'log measure.'" Appellant offered in evidence a book called a "Lumber and Log Book—Log Tally Calculator," which purports to show measurements the same as appellant contends he stated to appellee the measurement of the logs was to be taken. At the measurement of the logs, appellant and an assistant testify to the count as 1545 logs, containing 165,337 feet of lumber, worth, at the agreed price, \$1570.80. Appellee offered in evidence the card which he states he had in his hand at the Casey Bank, showing the "Log Scale" or Doyle's Rule, as published in Scribner's and presented his assistant who counted the logs and made the measurements. Another assistant to appellee, who was not sworn, had made the computation of feet which appellee presented, and testified that it was correct. By appellee's count and measurement there were 1506 logs, measuring 63,483 feet, at the price agreed upon amounting to \$603. Appellee had paid appellant, after the measurement, the additional sum of \$403, and insists that it is payment in full.

Appellant declared upon the common counts with an unverified bill of particulars, claiming for 165,347 feet of logs at ninety-five cents per hundred, amounting to the sum of \$1570.80. Appellant did not declare on a special count. There does not appear to be any plea in the record, although the cause is declared to be at issue, and no advantage is claimed by this defect. There was a trial by jury and a verdict and judgment for costs against appellant, and the record is brought to this court for review.

Appellant assigns error that the judgment is against the manifest weight of the evidence. It is apparent that the principal

question of fact in the case is the method of measurement of the logs agreed upon between the parties, if their minds met upon either one of the two methods covered by the testimony. Appellant presented testimony, which was not contradicted, that logs, under the scale measure, were worth two dollars per one hundred feet for oak, and four dollars per one hundred feet for walnut; and that appellee was paying that price "about Westfield." Some of appellant's logs were walnut and the court instructed the jury that, if they "believed from a preponderance of the evidence, that the defendant received and accepted timber and saw logs from the plaintiff, and that by reason of a misunderstanding between the parties, there was never any meeting of their minds as to the terms of purchase, that Flint understood that he was selling for one consideration and the defendant, Mundy, understood that he was to pay another and different consideration, then, in that case, the law would create an implied contract on the part of Mundy to pay a reasonable market price for such timber and saw logs, as the same may be shown by the evidence."

We quote this to emphasize the fact that appellant did not make the issue as to the method of measuring logs, but merely asked for the reasonable value of his logs, about the delivery of which there was no question. The question of the measurement of logs and the manner thereof, under the pleadings, is a question raised by the defense to establish a special contract. Appellant testified that the method of measurement was stated as herein set out, and that the method should be that a twelve-inch log, twelve feet long should measure 144 feet board measure, and that he so stated to appellee, to which appellee answered "yes." J. E. Turner, President of the First National Bank of Casey, corroborates this statement and testifies that appellant and appellee had been talking in the back part of the bank and came out to the front part

and called him out to hear the bargain and to witness its terms, and that appellant stated the terms, that a twelve-inch log twelve feet long should be figured 144 feet, and according to that plan appellant had sold his timber to appellee at ninety-five cents per one hundred feet. Turner states that he does not remember that the term "log tally" was used, but he states positively that Donovan was not present when the contract was stated to him; that Donovan had been in and out of the bank, but that only himself, appellant and appellee were present at the time stated. Appellant had testified that he had met appellee at the Casey bank; that appellee and his partner, Donovan, and Mr. Turner were there; that appellee had called Turner up while they were making the deal. Appellee testified first that the conversation was at the bank at Westfield; later, he said it was at Casey. Appellee further stated that appellant and Donovan were present; that Donovan had told him about the timber and cut the timber for him; that he offered appellant ninety cents per one hundred feet log scale; that appellant said he would not do that; that they argued for a while and finally he said he would split the difference and take ninety-five cents per one hundred feet, and that appellee said he would take it and asked appellant if he wanted a written contract, and appellant said it was not necessary.

Appellee further testified that he had one of those log cards (Scribner's Log Table, Doyle's rule) "like he always had to buy and sell by all the time," and states: "I asked him if he was familiar with it. I asked him if he understood it and he said he did. He didn't say anything about measuring logs. I started to explain it (the card) and he said he understood it and that he knew the usual rule everybody sold by. I told him Donovan was going to do the sawing and saw the most of it into ties."

The card was produced and the witness stated that while talking with appellant he had it in his hand; that he started to explain the

log scale to appellee and "he advised me he knew all about it and I put it in my pocket and brought it home." Appellee states that he made the contract in Turner's bank; that Turner was around the bank and that he went to Turner first about appellant's timber; that he had been in Turner's bank about twenty minutes when appellant came. Appellee does not remember what appellant said in the bank, but that "log tally" was not mentioned. Appellee states he said he would buy the timber "log scale;" that he usually bought the timber by lump; that this was mostly tie timber, with some walnut. Appellee states the rule of "log scale" to arrive at the number of feet is to take one-half the diameter in inches, subtract two for wastage, then square that and multiply by one-fourth the length of the log in feet; and that a log twelve inches in diameter and twelve feet long would measure forty-eight feet.

Donovan testified that he took appellee to Casey to purchase the timber; that he heard appellant say nothing about the method of measurement of a log twelve inches in diameter and twelve feet long; that he saw Turner there and the card appellee had mentioned, or a similar one. Appellee produced a witness, Gard, who explained the method of arriving at the number of feet in a log by Doyle's Rule. He stated that the diameter of the log is taken, subtract four for slab, and square the result, which gives the amount of timber in a sixteen foot log. Then to determine the number of feet in a log, take one-sixteenth of that and multiply by the number of feet in the log. Gard testified that in a log six inches in diameter, there would be only one-fourth foot scale measure to a foot of log. Gard also attempted to testify to the number of feet in a twelve foot log and became lost in a maze of detail.

Cards and tables of measurements were introduced in evidence by the parties, as well as the computations of measurements as made by each party, according to their particular system, all of which

were somewhat confusing, and especially the measurements under the Doyle system of scale measure.

There is no testimony in the record tending to show that appellant had or saw the card containing the "Doyle" scale measurements, which appellee testified he had in his hand and offered to explain. Appellee's testimony that he mentioned the scale measurement in the Doyle's tables is substantially the only testimony in the record that tends to establish appellee's theory of the contract, and even then there is no testimony tending to show that appellant knew what was on the card or anything about Doyle's Rule. To sustain the verdict by a preponderance of the evidence, it seems necessary to believe that Turner, President of the Casey Bank, the only disinterested witness to any contract made, committed perjury, or was mistaken. We do not pass upon the question as to the weight of the testimony, as the verdict and judgment must be set aside on other grounds.

Appellant has pointed out numerous errors in the computation of feet in the logs, even under the Doyle Rule. All of the logs, except one hundred forty, were cut eight and one-half feet in length. In a large number the measurement was computed on the basis of an eight-foot log. In some, one foot in addition was added when there should have been two or three feet added. Appellant recast the measurement of only a portion of the logs under the Doyle Rule, and apparently pointed out these errors for the first time in this court. Some of these errors we have verified. Doubtless upon another trial the entire measurements will be recast.

Upon appellee's request the court gave appellee's third instruction as follows:

"The Court instructs the jury that the burden of proof in this class of cases is upon the party holding the affirmative; and if the jury find that the evidence bearing upon plaintiff's case is evenly balanced, or that it preponderates in favor of the defendant,

then the plaintiff cannot recover and the jury should find for the defendant. ”

We are aware of the rule that the burden of proof as to the entire case is upon the plaintiff; but it does not follow that plaintiff or defendant had the “affirmative” of any particular issue, in any particular case. In this case appellee admitted the purchase and delivery of the logs to him, and he, appellee, raised the only affirmative issue, that there was a special contract as to the measurement of the logs. The instruction given only tended to confuse the jury and raise a fictitious issue that was not in the case. It may well be that the jury, believing from the evidence that appellant understood he was contracting for one method of measurement, while the appellee understood he was contracting for another method—which is as charitable a construction as we can put upon the proofs in this case—understood from this instruction that appellant held the affirmative and therefore could not recover. Appellee seeks to sustain this instruction, because it was given *verbatim* in **Horne v. Walton**, 117 Ill. 136. That was an action to recover damages for fraud and deceit and there was no question but that the plaintiff held the affirmative on all issues raised. That was not the situation in the case at bar. In addition, the whole subject matter of the measurement of logs was a technical subject, and tended to confuse the lay mind. It was, without doubt, difficult to understand how twelve twelve-inch boards could be cut out of a log twelve inches in diameter and of any length. It was equally difficult for the jury to perceive, we premise, how, in a log eight inches in diameter and eight and one-half feet long, there was only eight feet of lumber, worth only about seven cents, which appellee’s witnesses testified would sell for a tie for from sixty-five cents to \$1.40. It is not strange that a juryman should become confused as to the method of

measurement, the definition of which none of the witnesses could give in the same terms, and some of the witnesses offered could not describe at all, and it is more than likely that the jury may have considered their confusions evenly balanced, and, following the terms of this instruction, found for the defendant. We hold the instruction given reversible error in this case.

The judgment of the Circuit Court of Clark County will be reversed and the cause remanded for further proceedings, not inconsistent with this opinion.

Reversed and Remanded.

Page 8

6235a
246 I.A. 633⁻

General No. 8088

Agenda No. 22

APRIL TERM, 1927

Edward C. Pyatt, et al,

v.

John Kramer, et al,

Partition

and

Hugh Scott, Administrator of the Estate of Ann E.

Pyatt, Deceased, Appellee,

v.

Edward C. Pyatt, et al, Edward C. Pyatt, Appellant.

Cross Bill for Relief

Appeal from the Circuit Court of Moultrie County
SHURTLEFF, P. J.

Appellant Edward C. Pyatt and the heirs at law of Ann E. Pyatt, deceased, presented their bill for partition of certain lands in Moultrie County, of which the deceased died seized, to the Circuit Court of that county, making the tenants and Hugh Scott, administrator of decedent's estate, parties defendant. Ann E. Pyatt, a widow, died on September 29, 1924, leaving her surviving Appellant Edward C. Pyatt, and the appellees Dorothy P. Williamson, George E. Pyatt, her children, and Mary George Noble, a grandchild, under age, the only surviving child and heir at law of Pearl Noble, deceased daughter, her only heirs at law. The minor appeared in this cause by a guardian *ad litem* and is one of the appellees in this court. Appellee Hugh Scott was appointed administrator of the estate and filed an inventory, listing the cash and notes in said estate at the sum of \$13,233.08. There was a small amount of other personal estate and the debts amounted to the sum of \$1,381.83, making a surplus of personal property in excess of the indebtedness to the amount of \$11,851.25. The inventory of the entire estate showed a gross value of \$36,274.11. There was a default, a hearing

before the master and a decree for partition, which was vacated during the term upon the administrator moving to set aside the decree and obtaining leave to answer the bill. Grant, the administrator, answered the bill and presented a cross bill, the answer and cross bill denying that Appellant Edward C. Pyatt was an equal owner in said lands with the other heirs at law, and setting out a contract and agreement entered into between appellant and his mother, under date of December 19, 1922, as follows:

“KNOW ALL MEN BY THESE PRESENTS.

“That this is a contract, entered into by and between Ann E. Pyatt, of Bethany, Illinois, the party of the first part and E. C. Pyatt of Sherrill, Arkansas, party of the second part.

“For which Ann E. Pyatt, the party of the first part pays and delivers to E. C. Pyatt the party of the second part (\$7,000) seven thousand dollars, in lieu of all his Dowery right, title and interest in the estate of Ann E. Pyatt party of the first part.

“Said E. C. Pyatt party of the second part does hereby acknowledge payment of the seven thousand dollars, and Ann E. Pyatt, party of the first part, her heirs, or assigns are hereby authorized to use this as a receipt against any claim that E. C. Pyatt, his heirs, or assigns may make against the said estate of Ann E. Pyatt.

“Be it further agreed by the said Ann E. Pyatt and E. C. Pyatt, that in the event of the tender by E. C. Pyatt party of the second part, the sums of seven thousand dollars with annual interest at the rate of six per cent to the said Ann E. Pyatt party of the first part that this article or agreement becomes null and void.

“And said E. C. Pyatt upon payment of above seven thousand dollars and interest as stated above is hereby allowed the privilege of regaining his Dowery, right, title and interest in said estate of Ann E. Pyatt.

E. C. Pyatt,

“Signed this 19th day of December 1922.

"State of Arkansas)
County of Jefferson)

"On this day appeared before me a duly commissioned, notary public, qualified and acting, Dr. E. C. Pyatt, within and for said county, to me personally well known as the grantor in the foregoing conveyance and stated that he had executed the same for the consideration, uses and purposes therein set forth, and I do so certify.

"Witness my hand and seal this 19th day of Dec. 1922.

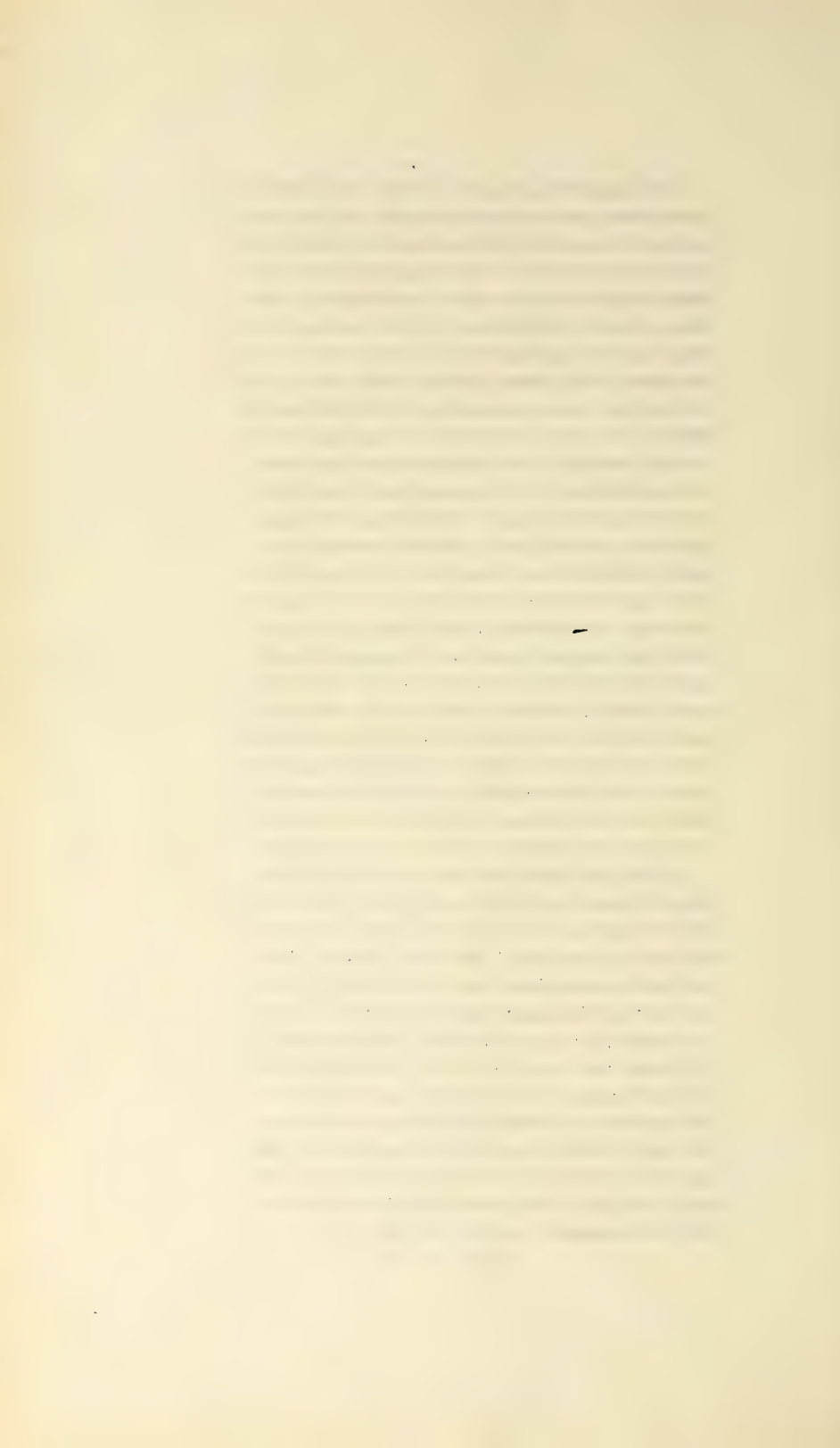
E. Pyle, Notary Public.

"My commission expires 3-24-26, 1926."

Said cross bill prayed that said advancement might be construed as in full payment to appellant of all of his interest in said estate, and be a bar to any further proceeding or claim on the part of appellant to said estate, and that the cross complainant as administrator of the estate should be decreed to be entitled to receive all that portion of the estate of decedent as would have belonged to or been payable to appellant. And the cross bill prayed for other and further general relief. Appellant demurred to the cross bill; the demurrer was overruled and appellant answered the bill. There was a decree of partition, finding that the complainants were each entitled to an undivided one-fourth interest in said lands, and that the interest of appellant was subject to whatever rights or interests the administrator of decedent's estate might have in appellant's interest to be thereafter determined by the decree of the court. There was a sale of the lands by the master in chancery and a preliminary order of distribution by which the master was directed to hold the remainder of the proceeds of sale, after making payments to the other heirs at law, until a hearing could be had upon the cross bill and a decretal order entered fixing the amount, if any, that appellant should pay out of his part of the proceeds of said sale to the cross complainant, upon a final decree.

The cross bill and answer thereto were referred to the master, further proofs were taken, and the master made a report to which appellant filed objections, which were overruled. Said objections were made exceptions before the chancellor, overruled and a final decree entered, establishing the said contract between appellant and his mother and decreeing the advancement, with interest thereon at the rate of six per cent per annum, amounting to the total sum of \$8,637.84, to be an indebtedness to the estate owing by said appellant to the administrator and unpaid, and payable in order for the appellant to share in the distribution of the estate. The contract and agreement was construed as an equitable mortgage to secure the indebtedness. It was further decreed that the estate had never been fully settled and that the administrator had not filed his final report in the county court, but that said estate was in process of settlement. The decree found the value of the real and personal property, as shown by the inventory filed in the county court, to be \$36,274.11; that the estate should be divided into four equal parts, including appellant as one of the heirs entitled to share in his mother's estate, and that one-fourth of the gross estate amounted to the sum of \$9,068.52. The decree then provided:

"That after paying the costs and expenses of settling said estate, one-fourth part thereof would probably be less than the amount due from appellant to the estate of deceased." The court, therefore, found that for the protection of the estate of Ann E. Pyatt one-fourth of the money derived from the sale of the real estate, belonging to said estate, after the payment of all costs, etc., should be paid to the administrator, and that appellant is entitled to share only in that portion of the one-fourth of said estate which exceeds the sum of \$8,637.84, after the payment of all costs and expenses of the settlement of the estate. The court held that it had jurisdiction of the matters set out in the amended cross bill, and that



the allegations set out in said bill were true. Appellant assigns error upon the matters in the decree and record and the cause is brought to this court for review. Appellees have assigned cross error upon the admission in evidence of appellant's testimony, over the objections of appellees.

Appellant complains of the allowance of a solicitor's fee of seven hundred dollars to the solicitors for appellees (complainants) under the decree of confirmation of the master's report of sale, but we do not find that any exception was taken to this allowance or any assignment of error made upon the decree.

Appellant demurred to the cross bill and now assigns error on the ground that the subject matter of the cross bill is not germane to the subject matter of the original bill; that upon the question of appellants indebtedness to the estate he was entitled to a jury trial, and that the court had no jurisdiction to entertain the cross bill. This is a misconception of the entire case. Appellant was instrumental in bringing the administrator into the case as a defendant. The administrator held a claim, secured by an equitable mortgage, upon the lands appellant was seeking to partition and sell. It was certainly a ground of equity and germane to the subject matter of the bill that the administrator should seek the collection of the claim and the enforcement of his lien before the lands should be sold and the proceeds distributed and the lien lost. We do not understand that in such cases defendants are entitled to a jury trial.

It is urged by appellant that no replication having been filed to appellant's answer to the cross bill, that answer must be taken as true. That is not the rule, however, where the parties proceed to put in proof as though a replication were filed, as was done in this case. This cause was not set down for hearing upon bill and answer. The replication was waived. **Webb v. Alton and Marine Fire Ins. Co., 5th Gilman.** 225. In this cause neither the master nor

the chancellor stated in detail the administrator's account, although the cross complainant testified that all of the personal estate had been converted into cash and all of the debts paid. Cross complainant further testified that the only matter that was preventing his final report was the partition suit. It is a familiar rule that a court of equity, having obtained jurisdiction upon any equitable ground, will retain it in order to do complete justice between the parties, although in doing so it may be necessary to establish purely legal rights or to grant legal remedies. **Longshore v. Longshore**, 200 Ill. 470. In this case it was error not to settle the administrator's account and the entire estate. Appellees have presented a cross error on the admission of appellant's testimony attempting to show payment and cancellation of the debt of seven thousand dollars to his mother. It is undisputed that in December, 1922, appellant's mother advanced him the sum of seven thousand dollars and took the contract and agreement offered in evidence. Appellant testified that after this contract was given he executed and forwarded a note to his mother for the amount which she held until shortly before her death, when upon some correspondence between them the mother returned the note to him, marked "paid." Appellant does not produce any of the correspondence and testifies that he destroyed the note. This testimony is not corroborated in any manner and clearly, under the statute, since it tended to lessen the amount and value of decedent's estate, it was incompetent.

There is testimony in the record offered by appellant tending to show payments upon the seven thousand dollar indebtedness. On August 16, 1920, appellant's mother conveyed to appellant 160 acres of land which had formerly belonged to appellant, the mother reserving an annuity of five hundred dollars upon the lands by the deed, and from the time of the conveyance the mother looked after the land and collected the rents. There is testimony that in the fall of 1920 the mother received a large amount of grain as the landlord's rent

upon the farm and converted it all to the payment of her annuity and her own use. The mother collected the rent of the land for the years 1921, 1922 and 1923, which was shown to be of the value of eight hundred dollars per annum, and none of which has been turned over to appellant. It is insisted that these rents, less the annuities, should be applied upon the contract indebtedness. Doubtless the rents accruing prior to the date of the contract and agreement of December 19, 1922, would be barred by the terms of that instrument. It seems to be conceded, but without proof, that the mother paid the taxes and the cost of repairs necessary, but with no testimony in the record even as to the tax receipts, the master found: That \$800 per annum would be a reasonable rental for said lands and that the \$500 annuity and the taxes and upkeep on said lands "would leave little or nothing," and the master and the chancellor were not able to find any sum that should be applied upon said debt. This was error. The master should have stated the account. The burden of proof was upon the administrator to show the disposition of the rents and income collected by the mother. Appellee insists that any credits of this nature should have been presented in the form of claims against the estate, and can not be credited upon appellant's indebtedness. In this appellee is in error for numerous reasons, one of which is appellant's indebtedness had never been inventoried and if appellant had intended these credits to apply upon his indebtedness, he could not very well present a claim against the estate.

Appellant assigns error upon the attempted statement of account or method of the division between the heirs set out in the decree. Indeed, it would appear that the court construed the indebtedness of appellant as belonging to the three other heirs and not to the estate. In this respect the decree is erroneous. Appellant is an heir at law and takes one-fourth of the amount of his own indebtedness

the same as the other heirs. The decree should be reversed and the cause remanded to the Circuit Court of Moultrie County, with directions to cause an accounting to be had by the administrator of the rents, issues and profits of appellant's land, received by appellant's mother after December 12, 1922, and prior to March 1, 1924. Any unexpended balance thereof should be applied to appellant's indebtedness to said estate in reduction thereof; and that said administrator should be required to make a full and complete accounting and settlement of the said estate, adding to the amount of the proceeds of the real and personal estate inventoried by him the amount of appellant's indebtedness, and any other property, moneys or proceeds that have come into his hands as such administrator. After deducting the claims, debts and expenses of administration of the estate, the remainder should be divided into four equal parts and distributed to the four heirs at law. In the distribution the court should take into consideration the distribution heretofore made in the partition suit and the indebtedness of appellant as so much distribution already made. The costs in the partition suit in the Circuit Court should be equally apportioned to the four heirs at law of Ann E. Pyatt, deceased, and the costs in this court should be equally apportioned among the three adult heirs at law. Otherwise, the decree of the Circuit Court should be affirmed.

Reversed and Remanded with Directions.

Gen. No. 8101

Agenda No. 34

APRIL TERM, A. D. 1927

Richard Rohweder, by Henry Rohweder, His Father
and Next Friend, Appellee,

vs.

Martin McMann, Ralph McMann and Vernie McMann,
Appellants.

Appeal from the Circuit Court of Adams County.

SHURTLEFF, J.

Appellee, by his next friend, brought suit in trespass in the Circuit Court of Adams County against appellants, to recover damages for injuries caused by appellants keeping, owning and harboring a certain dog of a savage, mischievous and ferocious disposition and nature, well knowing that said dog was of such nature, and on account of such disposition was likely to bite and injure mankind. Appellants pleaded not guilty and there was a trial by jury and a verdict and judgment for three thousand dollars in behalf of appellee, and appellants have appealed.

Appellee was a child five years of age and the proofs tend to show that the appellee received serious wounds from the bite of the dog. The appellants contend on appeal:

First, That the verdict in this case is contrary to the manifest weight of the evidence;

Second, That the evidence on behalf of appellee failed to show that the defendants, or either of them, ever had knowledge of the vicious propensities of the dog prior to the alleged attack mentioned in the declaration;

Third, That there is no evidence upon which the liability of Martin McMann, one of the defendants, can be based;

Fourth, That the court erred in overruling the appellants' motion at the close of the testimony for appellee;

Fifth, That the court erred in overruling appellants' motion at the close of all the evidence;

Sixth, That the amount of the damages fixed by the verdict is excessive; and

Seventh, That the evidence failed to show that the dog was vicious and accustomed to attack mankind prior to the attack mentioned in the declaration, and that defendants had knowledge thereof.

Appellants in this court have argued no assignments of error except as based upon the foregoing exceptions. There are no exceptions urged in this court as to the court's rulings in the admission or rejection of evidence, or the giving or refusing of instructions, and no questions of law are raised upon the record. The only contentions of appellants are that the evidence is insufficient to support the verdict and judgment and that the damages are excessive.

Appellee contends that the record does not purport to show all of the evidence taken in this case, and that the law requires that the record shall state that it contains all the evidence produced by both parties; that where that does not appear the reviewing court will presume that there was sufficient evidence to support the verdict, since all intendments are in favor of the judgment of the lower court, citing: **Chicago, Rock Island & Pacific Ry. Co. v. Town of Calumet**, 151 Ill. 512; **Kern v. Strasberger**, 71 id. 303; **Weingarden v. Weinberg, et al**, 203 Ill. App. 228; **Mohlgan v. Business Men's Accident Association**, 201 Ill. App. 338; **Continental Casualty Co v. Maxwell**, 127 id. 23; **Robertson v. Morgan**, 38 id. 137; **Grand Lodge Ind Order Free Sons of Israel v. Ohmstein**, 110 id. 322; **Ohio & Mississippi Ry Co v. Cope**, 36 id. 97, and **Grimley v. Donahue**, 36 id. 550. In **C. R. I. & P. Ry. Co. v. Town of Calumet**, supra, it was held: "In **Kern v. Strasberger**, 71 Ill. 303, it was held, where the court has jurisdiction of the parties and of the subject-matter of litigation, every presumption of law is in favor of the regularity of the judgment. It was also held in cases of law, evidence can only be preserved in the record by bill of exceptions, and the correctness of the finding of the court below will not be examined on appeal,

unless all the evidence upon which the court acted is thus preserved. In **Herman v. Pardridge**, 79 Ill. 471, it was held, where the court has jurisdiction of the person and subject-matter and renders judgment, and there is no bill of exceptions, the court will presume that the judgment is in all respects regular. See, also, **Hay v. Hayes**, 56 Ill. 342. Here the bill of exceptions does not purport to contain all the evidence heard by the court on the motion, nor does it purport to contain any of the evidence. We must, therefore, under the rule announced in the cases cited, presume that the judgment dismissing the appeal was warranted by the facts in evidence before the court at the time the judgment was rendered."

In **Continental Casualty Co v. Maxwell**, supra, the court held:

Some other questions are raised on this appeal that are dependent wholly on the evidence. These we cannot discuss, for the bill of exceptions does not disclose that it contains all the evidence. In such case the presumption is that there was before the jury and the trial court sufficient competent evidence to fully sustain the verdict and judgment. The bill of exceptions does not state that it contains all the evidence, nor does the trial judge so certify. The presumption in such case is that it does not.

"There is bound in with the record the following writing:

"I, Rene Havill, Official Reporter in and for the County of Wabash and State of Illinois, certify that the above and foregoing is a true and correct copy of all the evidence, both oral and documentary, heard on the trial of the aforesaid cause, taken from my stenographic shorthand notes.

"In witness Whereof, I have hereunto set my hand this 22d day of July, A. D. 1905, at Mt. Carmel, Illinois.

Rene Havill,

Official Reporter."

This does not meet the requirements of the law.
A reporter's

certificate has no place in a bill of exceptions. It must be stated in a bill of exceptions that it contains all the evidence, or it must be so stated in the judge's certificate. As we said in **Pointon v. The St. Louis, A. & T. H. R. R. Co.**, 90 Ill. App. 623: 'A bill of exceptions which fails to state that it contains all the evidence in the case is not aided by the statement of the reporter. The making of a bill of exceptions is a judicial act and cannot be delegated.' "

This court held in **Mohlman v. Business Men's Accident Association**, supra, page 338: "When the bill of exceptions does not state that it contains all the evidence, it may be presumed that there was other evidence offered on which the judgment can be sustained, but it will not be presumed that other evidence was introduced, by reason of which the judgment must be reversed."

In the case at bar the bill of exceptions is certified by the trial judge as follows: "And forasmuch as the matters above set forth do not fully appear of record, the defendants tender this bill of exceptions and pray that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made and provided, which is accordingly done this 25th day of March, A. D. 1927." which certificate was signed and sealed by the trial judge. No where is it stated or certified that the bill of exceptions contains all of the evidence introduced upon the trial of the case. Accordingly, in the view of this court, none of the questions raised by appellants are properly before this court, and it will be presumed that there was other evidence offered on which the judgment can be sustained. No issues of law being raised upon the record, the judgment of the Circuit Court of Adams County is affirmed.

Affirmed.

6237a

246 I.A. 633⁴

General No. 8105

Agenda No. 37

APRIL TERM, A. D. 1927

Henry G. Ailts, Appellee,

vs.

H. L. Huffington, Appellant.

Appeal from the Circuit Court of Tazewell County.

SHURTLEFF, P. J.

Appellee brought suit in the Tazewell County Circuit Court to recover damages for personal injuries to appellee, charged to have been caused by appellant's reckless and negligent driving of his car into the truck of appellee, at the intersection of Sixth and Washington Streets in the City of Pekin, on December 4, 1924. Appellee averred in his declaration that at and immediately preceding said collision he was in the exercise of due care and caution for his own safety.

Sixth Street in the City of Pekin runs north and south, and Washington Street intersects Sixth Street at right angles, running east and west. Appellee was driving south on Sixth Street with his auto truck and appellant was driving east on Washington Street with his car. At the intersection of said streets the two cars collided, the front of appellant's car striking the rear fender of appellee's truck, according to appellee's testimony, and the truck veered to the east, went over the curbing and ran into a house standing on a lot at the southeast corner of the intersection. Appellee and appellant were the only eye witnesses of the collision. Appellant testified that appellee's truck struck the left rear fender of his car. The testimony was conflicting, both as to the negligence charged against appellant and as to the question of the care and caution exercised by appellee in his own behalf. There was a plea

of not guilty, a trial by jury and a verdict and judgment for appellee in the sum of five hundred dollars. The court overruled a motion for a new trial and the record is brought to this court by appellant, on appeal, for review.

On the trial of the cause, while appellee was testifying, he was asked to relate a conversation he had had with appellant, and among other things, testified: "I said, 'that is what the insurance companies want. They want us both right or both wrong. Surely somebody is wrong,' and the argument led up that I was in the yard first and if he had the right of way how did I get up in front of him. If I was up to the house and he was behind, I was surely across the intersection and along that line." Appellant moved the entire conversation be stricken, which was overruled.

As to further conversation with the appellant, appellee was asked:

Q. "Will you tell what that conversation was?"

A. "I went to see if he heard anything in regards to the insurance company and he said, 'No,' he hadn't heard anything at that time and he said he carried insurance——."

This was objected to as prejudicial and the court struck out the answer. Counsel for appellant at once, out of the presence of the jury, moved the court to withdraw a juror, which was denied. Upon the re-assembling of the jury the following question was asked appellee by his counsel:

Q. "Mr. Ailts, omitting any reference whatever in your testimony to any matter of insurance that you carried or which anybody else may have carried, will you tell the jury what conversation you had with the defendant on this occasion fifteen or sixteen days after the accident?"

This was objected to by appellant as highly improper and the motion renewed to withdraw a juror and continue the case. The objection to the question was sustained, but the court denied the

motion to withdraw a juror, to all of which rulings appellant preserved exception and now assigns error upon the ruling of the court in this regard, citing **McCarthy v. Spring Valley Coal Co.**, 232 Ill. 473; **Bishop v. Junction Ry. Co.**, 289 Ill. 63; **Ruwisch v. Knoebel**, 233 Ill. App 526; **Wallner v. Smith-Lohr Coal Co.**, 145 Ill. App. 386, and other cases. Apparently, the rule deducible from these cases is, that when it is impossible to tell the effect on the verdict of the impressions wrongfully conveyed to the jury's mind by the improper conduct of counsel or a party, the verdict should be set aside. In **McCarthy v. Spring Valley Coal Co.**, *supra*, the court held:

"The question in which Mr. Bayne was referred to as the attorney of the Aetna Insurance Company was also justly subject to criticism. The question asked was as follows: 'At the time that this statement was taken from Luke Frain at the office of the Spring Valley Coal Company, was Mr. Bayne, the attorney for the Aetna Insurance Company, there?' It is as strange as it is unfortunate that this question should have been asked through mere inadyvertence, as stated in appellee's brief. It is strange that with the name of appellant in counsel's mouth, the name of Mr. Bayne, who was then present assisting in the trial as attorney for the appellant, should have associated itself in counsel's mind and speech with the name of the Aetna Insurance Company as attorney instead of with the name of the appellant. The question and the circumstances were well adapted to intimate strongly to the jury that the appellant was insured against liability for accidents of this character, and that the party which would have to respond for any judgment which might be rendered was the Aetna Insurance Company. Evidence of this character was not competent. The intimation may not have been true, and it is unfortunate that the suggestion should have been inadvertently made. The only effect it could have would be to convey an improper impression to the jury." The court reversed the judgment, stating: "It is impossible to tell

the effect, on the verdict, of the impressions wrongfully conveyed to the jury's mind," etc. We do not see that it makes any difference whether the impression is conveyed by counsel or a party, and its capacity to create prejudice and to do injury is just the same, whether it is done purposely with an evil intent, or unwittingly and in ignorance of its prejudicial character. The record in this case does not show that appellee or his counsel violated any of the ethics in court procedure to get the subject matter of insurance before the jury, and there is nothing in the record to indicate that appellee appreciated its import, or that his counsel anticipated the answer which the witness gave. However, the answers of appellee openly apprised the jury that appellant was protected by insurance and indemnified against loss for any verdict found against him, and it is impossible, under the particular facts in this case, to determine just what effect it may have had upon the jury's mind. It may have been the sole reason for the verdict found in the case.

The only case in this State presented by appellee to support the verdict is **Savage v. Hayes Brothers Co.**, 142 Ill. App. 316. In that case James Francis, a witness for appellee, having been cross-examined by appellant with reference to a statement he had signed concerning the accident, after it had been prepared by one Garrett, was reexamined as to why the statement was sought from him, and stated that Garrett was an agent of the insurance company. This answer was excluded by the court. The court said: "We do not doubt that it was improper for appellee's attorney to make these allusions and it is to be regretted that the verdict, otherwise right, should be imperilled by the course pursued by appellees' attorney, especially as the ruling of the trial court indicated the danger of such conduct." The court, in refusing to hold the impropriety a reversible error, said: "Second, the case is strong on its merits and the damages are exceedingly moderate, which indicates that the jury were not led astray or prejudiced by the reference to the insurance matter."

In other words, the court was able to determine, from the record, that the jury had not been prejudiced by the offensive matter. We conclude that **Savage v. Hayes Brothers Company**, *supra*, is in line with the rule laid down. We cannot make the same finding in the case at bar that was made in **Savage v. Hayes Brothers Company** on the facts, and we are of the opinion that the testimony constituted reversible error in this case.

Appellant assigns error upon the giving of the second instruction for appellee, which reads. "You are further instructed that if you believe from the greater weight of the evidence in this case that on the 4th day of December, 1924, the plaintiff, Henry W. Ailts was driving an auto truck south upon and along Sixth Street in the City of Pekin and across Washington Street in said city, and further believe from the greater weight of the evidence that the plaintiff while driving said auto truck along said public street approaching and at the crossing of said streets was in the exercise of due care and caution for his safety and further believe from the greater weight of the evidence that the defendant on said date and at the same time was driving an automobile east upon and along Washington street and further believe from the greater weight of the evidence that the defendant while driving said automobile along said Washington street approaching and at the crossing or intersection of said street with Sixth street if proven, drove said automobile negligently, carelessly and recklessly as charged in the declaration in this case; and further believe from the greater weight of the evidence that by reason of the defendant driving said automobile negligently, carelessly and recklessly, the plaintiff drove said auto truck into and against the residence of A. N. Black in endeavoring to prevent the defendant's car from striking said auto truck driven by the plaintiff, and further believe that the plaintiff was then and there in exercise of due care and caution for his safety; and further believe that the plaintiff was injured at the time his auto truck collided

with the residence of A. N. Black, then in that state of the evidence you should find for the plaintiff."

The instruction is too long and involved and is argumentative. The instruction omits the question of proximate cause. It also omits the question of any negligence whatever on the part of appellee contributing to the injury. The instruction should not refer to the declaration without presenting to the jury in some instruction the nature of the charges in the declaration. Other criticisms are pointed out, but since the case will be submitted to another jury, appellee will doubtless revise the instruction.

For the reasons pointed out, the judgment of the Circuit Court of Tazewell County is reversed and the cause remanded to that court for another trial.

Reversed and Remanded.

62 38a

246 I.A. 633⁵

General No. 8115.

Agenda No. 46.

APRIL TERM, 1927

Geneva Bozarth, by her next friend, Leslie Bozarth,
Appellee,

vs.

Louis Ayers, Appellant.

Appeal from the Circuit Court of Sangamon County.
SHURTLEFF, P. J.

Appellee, a child about twelve years of age, by Leslie Bozarth, her father and next friend, filed her declaration to the September term, 1925, of the Circuit Court of Sangamon County in trespass, charging appellant with statutory rape and claiming damages in the sum of twenty-five thousand dollars. There were two counts in the declaration, the first charging statutory rape and the second alleging that the act was committed without the consent of appellee. Appellant pleaded the general issue; also, the statute of limitations.

The proofs tended to show that appellant, who was of the age of sixty-six years, owned and occupied a seven room house in the village of Williamsville, in Sangamon County. One W. I. Johnson, who worked for appellant and his sister, Catherine Johnson, occupied the same house and appellant boarded with them. Appellant was engaged in operating three threshing machine outfits, a couple of hay presses and a clover huller in Sangamon and Logan counties. He was much away from home, leaving early in the morning and returning in the evening. In the spring and early summer appellant and Johnson spent much time at the farm of William Fuleher, about four and one-half miles north of Williamsville, where he kept his machinery, repairing

the same for the season's work. Appellant kept an automobile which Johnson usually drove and always cranked for appellant. Appellant had a wife and three married daughters living at Weldon in DeWitt County, whom he visited once or twice a month. The wife remained at Weldon because she preferred to be near her daughters and grandchildren, but there was no break in appellant's domestic relations. He had been engaged in business in Williamsville for about eight years. Appellant was not in the best of health. He had been troubled with a double hernia for nine years and had been troubled with his kidneys. He had the "flu" and pneumonia in April and May, 1924, and had been confined to his home.

Appellee, who was eleven years old in June, 1924, with her sister, Mary Bozarth, then nine years of age, had lived with their grandmother, Molly Bozarth, in 1922 and 1923, across the road from appellant's home. Their father, Leslie Bozarth, was divorced from their mother, who was living in Ohio, and the children had lived a part of the time with their father in Peoria and more of their time with their grandmother in Williamsville. The father was married to a second wife on May 31, 1924, and lived in Peoria. It is a contested question of fact whether the children were with their grandmother in Williamsville in May and June, 1924, or were living in Peoria. Some of the time prior to June, 1924, appellee had lived at the Home of the Friendless in Springfield. Appellee and her sister, when living at their grandmother's, at times would go across to appellant's, more frequently on Sundays, to look at the funny pictures in the papers and listen to the radio. They were across the street at appellant's home three or four times a month, usually every Sunday.

Appellee testified that on June 2, 1924, appellant requested her and her sister in the afternoon to take a ride and that they went with him; that he had asked their grandmother if they could go; that he drove them to where the machinery was kept; that he had a threshing machine and other machinery there; that it was Mr. Prickett's

house they went to, about two miles from Williams-ville. The sister, Mary, testified that the place was an old barn and again called it a shed, and that it was the place where appellant kept machinery. Both girls testify that when they got to the place the car was stopped about a block from the barn; that appellant got out of the car and went to the barn and was gone some little time, and then returned to the car and asked appellee to go over to the barn and see some little kittens; that he told Mary to remain in the car and later he would show the kittens to her. Appellee testifies that she was taken to the barn and put upon a little work bench about four and a half feet high attached to a manger; that appellant put her upon the bench and as she testifies: "He lifted me up and laid me down. My sister was about a block from there in the car. I was trying to get up; I never said anything to him; I never told him not to do it. He removed my bloomers. He never got on top of me; he was standing up and I kind of laying off from the bench up to about my hips. He kept me there quite a while. He took his privates out and inserted them into my privates and had sexual intercourse with me. I have been told and understand what that means. My privates were sore afterwards." Appellee testifies that she never complained to anyone, never told her grandmother and never saw a doctor.

Appellee further testifies that prior to that time when she visited appellant's house he would have her sit upon his lap and that he would put his hands under her clothes and upon her privates, but that she never had told anyone of this or of what took place in the barn, except that she told her sister Mary of what took place in the barn on that same afternoon.

Appellant and appellee returned from the barn to the machine and Mary was told that she could not see the kittens that afternoon. The sister Mary testified that the place where they went—"no one was in the house." She corroborated the story told by appellee except as to what took place in the barn. She says it was just a

little ways out from Williamsville and there was a lot of machinery there that belonged to appellant. Mary testifies they were in the shed "about an hour or half an hour or fifteen minutes." On her direct testimony appellee had testified: "We went in the barn and he closed the door behind us. There was a bench there by the trough or else it was tacked on it there, of course, and he told me to take down my bloomers and I wouldn't do it and he took them down. He told me not to tell anyone and gave me a quarter. He had given me dimes, nickels and quarters and fifteen cents before. We then went out to the cemetery and from there home."

Appellee further testifies that after that she continued to go to appellant's up to about July 4th when she went to Peoria. Appellee further testifies: "I never told anyone. I told my youngest sister first, when I first got in the car. I didn't tell my father about it. My sister told him that Mr. Ayers had intercourse with me. I didn't tell him anything. He didn't inquire about it. It was the following spring—this happened in the spring, and it was the following spring that I told him, which would be in the spring of 1925. That is when my father found it out through my sister."

The grandmother corroborated appellee to the extent of testifying that appellant asked her on June 2, 1924, if he could take the children for a ride and that she gave her permission, and she fixed the date as three days after her son's marriage. The children had fixed the date in the same way. Appellant contradicted the testimony entire. He testified that the children had come to his home until in April or May, 1923, when he directed them not to come any more. Appellant was not permitted to state why he "barred" them, but did answer: "They would get in the square desk," and he states that they were never on his place after he prohibited them from coming there. In every detail he contradicted the story of appellee and stated that the children were not living in Williamsville in May or June, 1924, but quoted the grandmother as stating that they were living

in Peoria at that time with their father. In this appellant was corroborated by a very respectable portion of the citizens of Williamsville, men and women, whom neither the grandmother or father of the children or any other witness saw fit to rebut. It was shown beyond question that appellant kept no machinery at the "Prickett" place and that the house was occupied by a Mrs. Cofer and her five or six children. Appellant testified—and it was not disputed that the first time he ever heard of this charge was in June, 1925, when the father, Leslie Bozarth, with his attorney, called on him and asked for a settlement. There was a trial by jury and verdict for appellee in the sum of two thousand dollars, a motion for new trial by appellant, which was overruled, and judgment on the verdict. Appellant has appealed.

Appellant assigns error that the court refused to admit the testimony of a long line of witnesses, who were offered to testify that appellant's reputation for chastity was good in the neighborhood where he resided, to which appellant excepted. The charge in the declaration in this case constitutes a felony and one of the most atrocious kind, and it is conceded by all parties that to recover appellee must prove her charge beyond all reasonable doubt. The charge is also one involving moral turpitude and in common parlance it may be said that appellant's character is in issue. The general rule is, as stated in *Corpus Juris*, volume 22, page 473:

As the presumption is in favor of the good character of an individual, and the party who relies on the bad character of his adversary as part of his case has the burden of proof, the general rule is that a party is not entitled to introduce evidence of his good character, in the first instance, merely because his adversary has, by the pleadings or the nature of the action, charged him with committing a legal wrong, or even an act for which he might be

subjected to a criminal prosecution, as where the action involves charges of assault and battery, adultery or fornication, embezzlement, fraud, incendiarism, or malicious injury," etc., and the author says: "The rule is not affected by the introduction of evidence bearing on the issue of whether or not the act charged has been committed, although such evidence if believed tends also incidentally to assail character. * . *

There is, however, authority to the effect that, where the nature of the action directly assails the moral character, or where the evidence of fraud or other wrongdoing is entirely circumstantial, or the charge impugns the party's credibility as a witness, evidence of character will be received."

It has been held that chastity may be shown in proceedings involving adultery, indecent assault or rape, but is irrelevant in a homicide case. (*Balkum v. State*, 115 Ala. 117; *Com. v. Kendall*, 113 Mass. 210; *Bingham v. Bernard*, 36 Minn. 114.) The rule, so far as it has been carried in this State, is stated with great succinctness by Mr. Justice Bailey in *McBean v. Fox*, 1 Ill. App. 186:

"As a general rule, evidence of good character is confined to criminal prosecutions, involving questions of moral turpitude. There are, it is true, some exceptions, consisting of that class of actions where general character is drawn in question by the pleadings or points involved in the cause. In slander, the plaintiff's general moral character in an object of inquiry, with a view to the amount of damages he is entitled to claim. Cases of seduction, criminal conversation, and breach of promise of marriage, are also exceptions, and there are doubtless others. But where a civil action is brought for an injury to rights of property, though the injury is legally criminal, and involves moral turpitude, so that on an indictment evidence of character would be obviously receivable, the authorities are against its admissibility."

An examination of a considerable number of cases in this state: **Israel v. Brooks**, 23 Ill. 526; **Burnett v. Simpkins**, 24 Ill. 265; **Sprague v. Craig**, 51 Ill. 293; **Berdell v. Berdell**, 80 Ill. 607; **Gross v. Rutledge**, 81 Ill. 266; **Cummins v. Crawford**, 88 Ill. 312; **Rosenkrans v. Barker**, 115 Ill. 339; **Luthmers v. Hazel**, 212 Ill. App. 205, together with **Great Western Life Insurance Co. v. Sparks**, 49 L. R. A. (N. S.), page 725 and note; same case 38 Okl. 395, 132 Pac. 1092, leaves the question about as Mr. Justice Bailey left it in **McBean v. Fox**, *supra*,—"There are doubtless other exceptions," but this court is not prepared to consider the case at bar one of them. This case will be reversed on other grounds and upon another trial the question may not arise.

Some complaint is made by appellant for the court's refusal to give two instructions. Appellant's fifth refused instruction, covering the question of reasonable doubt "based upon the evidence or want of evidence in the case," should have been given. The serious question raised by appellant on this record is that the verdict is against the manifest weight of the evidence. The testimony to support the verdict is furnished by the grandmother and two children uncorroborated by any other witness, and the testimony to establish the offense itself is based upon the uncorroborated story of appellee. The testimony introduced does establish beyond a reasonable doubt that the place where the act was claimed to have been committed was not the Prickett farm, for other reasons in addition to the fact that appellant did not then have and never had had a threshing machine or any machinery on the Prickett place and the place was occupied. The description of the Fulcher place and the iron shed at Elkhart, four and one-half miles north of Williamsville, where appellant did keep all of his machinery, makes it impossible that appellant could have driven these children to that hill on June 2, 1924. If appellee is as worldly wise and mature as her testimony

would seem to indicate, she could and would have directed her father and counsel to the same old, unoccupied house and barn or shed back some distance from the road where she was ravished on the afternoon of June 2, 1924. She could and would point out the work bench, about four and one-half feet high, nailed or fastened to a "manger" or "trough" upon which she was laid. If she was not sufficiently worldly wise and mature to do that, she is too immature and uncertain to accept her statement as to the other transactions that she charges took place that day that she never has deemed of sufficient importance to tell to anyone except her sister soon after she came out of the barn. If appellee was ravished and injured in the way she testifies she was, it lies and did lie at the time of the trial within the purview of surgical science to make some demonstration or corroboration of the fact; but she testifies that she has never been examined by a doctor and no effort has ever been made by those surrounding her to identify the scene of the crime. It doubtless may be said that this is merely a civil action and a judgment calling for the payment of two thousand dollars in money. Since when in this class of cases did suitors obtain the right to vend the criminal statutes for hire? There has been no criminal prosecution of this case, no indictment and the statute of limitations has now run. There was, in days of old, a symptom of legal ethics which forbade a suitor from recovering for the injury caused by a felony until the criminal statute had been enforced. In Bishop on Criminal Law, third ed. vol. 1, sec. 558, it was stated:

"The New Hampshire court has held that the party suffering from a felony need not wait till the criminal matter is finally disposed of before bringing his action; but that it is sufficient to delay till then the trial. This distinction seems not directly to conflict with any common law authorities, but to be in harmony with the principles on which they all repose. The plaintiff is in no fault

while he is doing all he can, and as fast as he can, in respect to the crime; and no reason appears why he may not pursue his civil remedy, only not pressing his suit to a final termination in advance of his public duty."

The question of his public duty has always been considered fundamental and is elementary. The best evidence of appellee's rights in the case at bar, would be a court record showing appellant's conviction of a felony. The testimony showed that these children rode in appellant's automobile prior to June 2, 1924, at different times. It seems strange that the grandmother and both children should remember two years later that on this particular occasion it was on June 2, 1924, in the afternoon of the day. On the trial a dozen witnesses in behalf of appellant testified that these children were not in Williamsville in June, 1924, some testifying that the grandmother had said they were in Peoria with their father; others stating they had not been seen in Williamsville. The children, wherever they were, were under the custody and control of the father, and all during the trial the father, with his counsel, sat in court and gave no testimony in the case. Appellant was corroborated by the Johnsons in stating that the children had not been in their home after the fall of 1923.

We are aware that the jury saw and heard the witnesses testify and are better able to determine the credit to be given to the testimony of the different witnesses than a court that reads the testimony from the printed page. However, when the testimony in the record, in the view of the court, is insufficient to satisfy the mind of the court of the truth of the charge, beyond a reasonable doubt, it is the duty of the court to reverse the judgment.

Leslie Bozarth, father and next friend of appellee, had been employed by appellant before moving to Peoria. He returned to Williamsville and was working for Ralph Taylor in October, 1924.

He had lived in Springfield or did live there at a later date. The grandmother moved away from Williamsville to New Berlin and then returned to Williamsville. There was some testimony tending to support the declaration and the court did not err in refusing to instruct the jury. In the view of this court the manifest weight of the testimony does not support the verdict and the judgment of the Circuit Court of Sangamon County is reversed and the cause remanded for further proceedings, not inconsistent with this opinion.

Reversed and Remanded.

6239a

246 I.A. 634¹

General No. 8062.

Agenda No. 3.

APRIL TERM, 1927

People of the State of Illinois, Defendant in Error,

vs.

Walter S. Haxton, alies Pete Haxton, Plaintiff in
Error.

Writ of Error to the Circuit Court, Morgan County.
ELDREDGE, J.

The State's Attorney of Morgan County filed an information in the Circuit court thereof in the name of the People of the State of Illinois, against Walter S. Haxton, alias Pete Haxton, plaintiff in error, charging the latter with violations of the prohibition Act of July, 1921. The information originally consisted of four counts. To the first and fourth counts the State's Attorney, by leave of court, entered a **nolle prosequi** and the trial was had on the second and third counts, resulting in the conviction of plaintiff in error upon each of said last mentioned counts. Before the trial, plaintiff in error made a motion to quash each of said remaining counts, which motion was overruled and this action of the court is assigned as error. These counts are identically the same with the exception that the second charges the unlawful possession of certain intoxicating liquors, to-wit, whisky, while the third charges the unlawful possession of certain intoxicating liquor, to-wit, wine, therefore what is said will

apply equally to each of them.

It is averred in the second count "that the said Walter S. Haxton, alias Pete Haxton, late of the County of Morgan, in the State of Illinois, on the 12th day of September, in the year of our Lord one thousand nine hundred and twenty-five, at and in the County of Morgan, in the State of Illinois, did willfully and unlawfully possess certain intoxicating liquor, to-wit, certain whisky, containing more than one-half of 1 per centum of alcohol by volume and fit for beverage purposes; the said Walter S. Haxton, alias Pete Haxton, not then and there having a permit from the Attorney-General of the State of Illinois to possess said intoxicating liquor, and the said Walter S. Haxton, alias Pete Haxton, not having theretofore lawfully obtained said intoxicating liquor from a physician having a permit from the Attorney-General, of the State of Illinois to prescribe intoxicating liquor, and the said Walter S. Haxton, alias Pete Haxton, not having otherwise lawfully obtained said intoxicating liquor and not then and there possessing said intoxicating liquor in his private dwelling for use for the personal consumption of himself and his family residing in said dwelling and of his bona fide guests entertained by him therein; the said possession of said intoxicating liquor by him, the said Walter S. Haxton, alias Pete Haxton, being

then and there unlawful and prohibited and in violation of the Illinois Prohibition Act contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois.”

It is urged that the only offense charged in the above count is that of the unlawful possession of certain intoxicating liquor, and the contention of plaintiff in error is, that conceding all the facts set out in the count to be true, yet no crime under the Prohibition Act is alleged. This same contention was made in the cases of **People v. Talbot**, 322 Ill. 416; **People v. Mosley**, 245 Ill. App. 388; **People v. Martin**, *idem* 282, and **People v. Smith**, *idem* 119. It was held in those cases that the defense that the intoxicating liquor was possessed lawfully was an affirmative one and need not be negatived in the information or indictment. The other errors assigned are without merit.

The judgment is affirmed.

6240a

246 I.A. 634²

General No. 8073.

Agenda No. 9.

APRIL TERM, A. D. 1927

O. M. Sizemore, Appellee,

vs.

John McDaniel, Appellant.

Appeal from Circuit Court, Edgar County.

ELDREDGE J.

This action was originally brought in assumpsit to recover damages for a breach of warranty in a warranty deed. On an appeal to this court (Sizemore vs. McDaniel, 239 Ill. App. 280) we held that the proper cause of action was one in covenant and the judgment was reversed and the cause remanded. Upon the reinstatement of the case in the court below, the declaration was amended so as to present a cause of action in covenant. Issues were joined and the cause submitted to the court for trial without a jury. The court found the issues in favor of appellee and assessed the damages at the sum of \$500.00, upon which finding judgment was entered and from which judgment this appeal is prosecuted. There was ample evidence in the case to support the judgment. In a trial of a cause before the court without a jury, the court is presumed to consider only the evidence which is competent and if there is sufficient competent evidence in the record to support

the finding it is immaterial whether some of the evidence admitted by the court is not competent. No propositions of law were asked and consequently there are none to be considered by this court.

There being sufficient competent evidence to support the finding the judgment is affirmed.

Judgment affirmed.

624a

246 I.A. 634³

General No. 8082

Agenda No. 18.

APRIL TERM, A. D. 1927

Paul Prehn, Appellee,

vs.

Illinois Power and Light Corporation, Appellant.

Appeal from Circuit Court Champaign County.

ELDREDGE, J.

Paul Prehn, appellee, in the Circuit Court of Champaign County, obtained a judgment for \$325.00 against appellant, for damages to his automobile received in a collision between it and a street car operated by appellant in the City of Champaign. The declaration consists of one count and charges general negligence only.

On November 10, 1923, appellee lived in the City of Champaign and was a wrestling and boxing coach at the University of Illinois. At about 7:30 o'clock on the morning of that day he, accompanied by a friend, Dewey Kemp, started from a garage in his automobile to go to the University gymnasium. The morning was very foggy and while the density thereof varied somewhat, appellee in his testimony states: "the fog was dense enough all of the way along that you could not see across the street, especially driving a car." Appellee also testified, in substance, that before he

left the garage he raised the windshield and turned on his headlights which were new and bright; that as he was driving south on Neil street, after he had passed the intersection of White street, he turned the automobile to the left to avoid another automobile parked next to the curb on the west side of Neil street; the street car tracks of appellant ran north and south in the center of Neil street; he was driving at a rate of speed between five and ten miles an hour and he and Kemp were looking to the side, as well as forward, on account of the fog; as he turned his automobile to the left to avoid the one parked by the curb, it passed over the west track of the street car tracks of appellant and while in that position was struck by a street car proceeding north on Neil street; when he first saw the street car it was ten or fifteen feet away; there was no headlight on the street car nor any sounding of a horn or bell, nor noise of any kind; that it was just a second or a few seconds after he saw the street car until the time of the impact; after the accident the automobile and the street car were locked together or, at least, they were in physical contact; the street car was running at the rate of speed of fifteen miles per hour. On cross examination he testified that he did not mean to say there wasn't a gong sounded, but that he did not hear one and that it is the same with reference to the

lights, that he did not see any lights on the street car; both the street car and the automobile stopped practically immediately after the collision; the headlights on his automobile would show objects that morning about fifteen or twenty feet away; that the street was slippery and he did not remember whether his car skidded any or not. Dewey Kemp, in general, corroborated appellee and also testified, in substance, that there was no light on the front end of the street car; he did not hear any bell sounded or any warnings of any kind; he remembered that the lights in the back of the street car were burning when he left the scene of the accident; that the motorman left the street car right after the accident and came over to the automobile where he and appellee were sitting. George Shefler, a witness on behalf of appellee, testified, in substance, that at the time of the accident he was walking south on the east side of Neil street about sixty feet away; he did not see the automobile or the street car until after the collision; he heard the engine of the automobile and also the noise of the street car running; he could not see any lights on either the street car or the automobile from the sidewalk where he was; he heard the collision and went over as quickly as he could; does not remember hearing any gong, bell or whistle sounded; did not know whether there was a head-

light burning on the street car, but when he got to the place of the collision, lights were burning on the street car and appellee and his friend were still in the automobile. These were the only witnesses who testified for appellee in regard to the accident itself.

On behalf of appellant, Roy Tatlock, the motorman of the street car in question, testified, in substance, that he had been employed by appellant for about nineteen years and had been a motorman for seven years; he started north on Neil street from Healy street; there were no passengers on the street car; the headlight on the street car was burning and also the lights inside of the car; as he came to the scene of the accident he was running very slow, about five miles per hour, and was ringing the bell all the time; when he first saw the automobile it was about ten feet from him in the middle of the track, facing him; he immediately applied the brakes on the car and it was practically stopped when the automobile hit it; in his judgment the automobile, at the time of the collision, was running between twenty and twenty-five miles per hour. Mr. Gemming, living at 313 South Neil street, near the scene of the accident, stated that he was on the front porch of the house, which faces Neil street, and saw the street car approaching from the north; the headlight on

the car was burning as were also the lights inside of the car, though they appeared dimly through the fog; the bell was sounding on the street car; he also saw the headlight on appellee's automobile, which at the time, was coming south on the street car tracks at a rate of speed between thirty and thirty-five miles per hour. Claude Sowers was a motorman on an Interurban car which was following immediately behind the street car, and testified that he was following very slowly behind the street car, heard the gong sounded and heard the collision and proceeded at once to the scene of the accident, where he found appellee sitting in the automobile and saw the headlight and the other lights on the street car burning. Substantially the same facts are testified to by John Doran, conductor of the Interurban car. Mrs. Lulu Roney, who also lived at 313 South Neil street, testified that she was also on the front porch of the house before and at the time of the accident and was talking to some of her roomers; that it was very foggy and one could not see very far, but she saw the headlight and the lights in the street car as the car reached Springfield avenue, though the lights were dim through the fog; the street car passed almost directly in front of her house and was moving very slowly, not more than five miles an hour and she heard the

gong sounded on the car; she could see the lights on the automobile when it was north of the place of the accident though they were dim, but she could tell there was an object coming; the automobile, before the accident, was traveling about twenty miles an hour; the "gonging" of the bell on the street car first attracted her attention. All the above witnesses testifying on behalf of appellant also stated that they saw no automobile parked on the west side of Neil street. Neil street extends through a thickly populated part of the city of Champaign and is a much traveled street. The theory of appellee is that the motorman on the street car, before the accident, was running his car through a dense fog at too great a speed without any headlight burning on the car and without giving any warning of its approach. As to the rate of speed it is conclusively shown that the street car was traveling very slowly for the reason that it stopped almost instantly after the collision. We are also of the opinion that a preponderance of the evidence does not show that the headlight on the street car was not lighted, before and at the time of the collision. The testimony of the motorman in regard to the headlight is corroborated by two disinterested witnesses, Gemming and Mrs. Roney, and also, to some extent, by the witnesses Sheffler and Kemp, who testified on behalf of

appellee. Sheffler, who was only sixty feet away from the accident at the time it occurred and immediately went to the scene of the collision and then noticed that there were lights burning on the street car. Kemp who was in the automobile with appellee, also testified that after the collision he noticed lights inside of the car. It is highly improbable that the motorman would have lighted the lights inside of the car and not the headlight. Moreover the evidence shows that all the lights were turned off and on by a switch located behind the motorman. Nor do we think it is shown by a preponderance of the evidence that the gong on the street car was not sounded.

The motorman testified that he did not see the automobile until it was within about ten feet from him and appellee testified that he did not see the street car until it was within fifteen or twenty feet from him. The street car running on a fixed track could not be turned in either direction to avoid the injury and the only thing the motorman could do when he saw the automobile of appellee was to stop his car as soon as possible. There is no evidence to show that the street car was not brought to a stop with all reasonable diligence. A careful consideration of all the evidence in this case leads us to the conclusion that neither party

was particularly at fault, or could be charged with negligence or contributory negligence, but that owing to the density of the fog neither party saw the other vehicle in time to avoid the collision and that it was one of those unfortunate accidents for which neither party was to blame.

On the trial appellee in proving the damages to the car on account of the injury, introduced the testimony of the owner of the garage where the repairs were made. This witness testified that some repairs were made which were not caused by the accident, and in support of the testimony of this witness many labor and material tickets were also introduced and it is claimed that some of these represented labor and material expended and used on the car for repairs which were not made necessary by the accident. Seventy-six pages of the abstract are devoted to the testimony on the damages to the car. The appellee entered a disclaimer as to a number of items embraced in the charges for these repairs, admitting that such were not made necessary by the accident. Appellant claims that many of the other tickets and items therein were erroneously admitted because they represented work done and articles furnished for repairs not made necessary by the accident, but has failed to point out in its brief any of these items, but leaves it to the court to examine this mass of testimony and determine for

itself if any such items in the bill for repairs were erroneously admitted in evidence. This is a duty which we must decline to assume. If any such items for repairs were erroneously admitted particular mention of them should have been made and the pages of the abstract referred to where they could be found.

Complaint is also made that the court erred in admitting the testimony of the court reporter who reported the testimony of certain witnesses on a former trial of this case. This testimony was offered in impeachment of certain witnesses who testified on the former trial. The court reporter was asked this question by counsel for appellee: "(Q) I will ask you to read from your notes Mr. Tatlock's testimony as to where the accident occurred." Thereupon the court reporter read from his notes a series of questions and answers asked of the witness and answered by him on the former trial. Also in attempting to impeach some of the testimony given by the witness Gemming, the court reporter was asked this question: "(Q) You may read his testimony on the distance this accident occurred from Springfield Avenue." The reporter again read a series of questions and answers given by said witness on the former trial of this cause. This was not the proper way to introduce impeaching evidence of this character. If a witness has testified on a second trial to facts, material to the issues, differently from what he did on the first trial and it is intended to impeach his

62 Fra
246 I.A. 634⁴

General No. 8086

Agenda No. 21

APRIL TERM, A. D. 1927.

Ethel Hodges, Appellee,

vs.

Commercial Union Assurance Company, Appellant.

Appeal from Circuit Court, Macoupin County

ELDREDGE, J.

Ethel Hodges, appellee, brought this action in assumpsit against the Commercial Union Assurance Company, appellant, to recover upon a policy of insurance for \$1,000.00, covering a building owned by her, against loss by fire and lightning. A jury was waived and the case was tried before the court who found the issues for appellee and assessed her damages at the face of the policy, \$1,000.00, on which finding judgment was entered. The building was worth approximately \$4000.00, and was substantially totally destroyed and no question as to the extent of the damages is involved. Appellant seeks to defeat appellee's recovery under the policy by two technical defenses: (1) failure to furnish proofs of loss, and (2) failure to demand an arbitration prior to bringing suit.

The building in question was a store building and located at Standard City. Appellee lived, at the time, in Springfield. She had procured the policy of insurance through appellee's agent,

the witness Dunn, who lived in Carlinville. When appellee was informed that her building had been burned, she went to Carlinville and met Mr. Dunn, who took her in his automobile to Standard City to review the ruins of the building. They remained in Standard City about an hour and then went back to Carlinville and proceeded to Dunn's office. There the latter made out a loss report to be sent to appellant. Appellee asked Dunn if there was anything more for her to do and he told her that if there was he would let her know and requested her to send her policy to him as he thought the adjuster would want to see the policy when he came. Shortly thereafter appellee sent her policy to Dunn who kept it for several months. Sometime after the fire she was notified to meet the adjuster at Dunn's office, but when she got there the adjuster had left. Appellee, through her attorneys, on March 31, 1926, wrote to appellant in regard to paying the policy, and on April 10, 1926, wrote a second letter making the same inquiry. Appellant, however, never answered either letter, but it appears that afterwards it turned the matter over to the Western Adjustment and Inspection Company of St. Louis, Missouri. The result of the negotiations with the Adjustment company was the refusal to pay the amount of the policy on the ground that appellee had not furnished proofs of

loss within sixty days from the time of the fire, in accordance with the terms of the policy.

Dunn was the local agent of appellant in Carlinville. The policy itself provides "but this policy shall not be valid until countersigned by the duly authorized agent of the company at Carlinville, Illinois," and is countersigned by Dunn, as such agent. It is the settled rule of law that an agent of an insurance company who has the power to solicit insurance, receive and forward applications, receive and deliver policies and collect premiums, even though his agency be confined to the territory in which he operates, is a general agent of the company and as such can waive provisions in the policy. **Phoenix Ins. Co. v. Stocks** 149 Ill 319; **Hancock Ut. Life Ins. Co. v. Schlink**, 175 Ill. 284; **Milwaukee Mech. Ins. Co. v. Schallman**, 188 Ill. 213; **Citizens Ins. Co. v. Stoddard**, 197 Ill 330. The policy contains the usual provision that no agent shall have power to waive any provision or condition thereof except such as by the terms of the policy may be the subject of agreement endorsed thereon or added thereto and unless such waiver shall be written upon or attached thereto. This provision of the policy has reference only to the conditions entering into and forming a part of the contract of insurance, and has no application to the conditions which are to be performed after loss has occurred. **Citizens Ins. Co. v. Stoddard**,

supra. The agent, Dunn, had power to waive the provisions requiring proofs of loss and if his words and actions would reasonably lead appellee to believe that no proofs of loss were necessary, then the above provision was waived. The court saw and heard the witnesses who testified and he was the only one who had the power to determine the credence to be given to each and his judgment is fully supported by the evidence. Appellant, through its agents, could not lure appellee into a sense of security by assuring her that she had no further duties to perform under the provisions of the policy after the fire occurred, obtain possession of the policy itself and then deny liability because appellee had not furnished proofs of loss. To hold otherwise would be to place a premium upon fraud.

As to the second defense above mentioned, the policy provided that in the event of disagreement as to the amount of the loss the same shall be ascertained by two appraisers and an umpire, who shall determine the same. There was no dispute as to the amount of the loss and appellant cannot avail itself of this provision of the policy, and even if it could, it was waived by the agent. The policy was for \$1,000.00, and the uncontradicted testimony was that the loss amounted to \$4,000.00, and there was no dispute over the amount of the loss. Moreover, the denial of any liability because no proofs of loss were furnished was a waiver of the provision for

arbitration. **Mechanics Ins. Co. v. Hodges**, 149 Ill. 298; **Williamsburg City Ins. Co. v. Carey**, 83 Ill. 457; **Phoenix Ins. Co. v. Stocks**, 149 Ill. 319; **Lohr Bottling Co. v. Ferguson**, 223 Ill. 88.

There is no error in the record and the judgment is affirmed.

Affirmed.

6243a

246 I.A. 634⁵

General No. 8104

Agenda No. 36

APRIL TERM, 1927.

Aud Sandusky, Appellant,

vs.

William Meithe, Appellee.

Appeal from Circuit Court, Vermilion County.

ELDREDGE, J.

Appellant was the owner of the Sharon Coal Mine near Georgetown in Vermilion county. This mine had been operated by certain parties under a lease. In April, 1926, appellant made an agreement with one Dalton, that the latter was to take over the lease of the parties who had been operating the mine, fix up the mine, operate it and pay appellant eight cents a ton royalty for all coal mined. Dalton undertook to put the mine in shape for operation and employed appellee to help him do so. He paid appellee \$40.00 on his wages, but it seems that he made a failure in the business and ceased operating the mine. Appellee had earned, as wages working in and about the mine, \$145.00. Being unable to collect the balance of \$104.03 due him from Dalton he sued appellant therefor before a justice of the peace and on another trial on appeal to the Circuit court, he recovered another judgment against appellant for a like amount.

There is nothing in the evidence in this case which tends to show that appellant employed appellee or that he promised to pay him for any work that he might perform about the mine. If anybody was liable for the payment of his wages it was Dalton and appellee must resort to his remedy against him to recover what is due him therefor.

The judgment is reversed and cause remanded.

Transferred
Refused

abstract

6244a

246 I.A. 634⁶

General No. 8110

Agenda No. 42

APRIL TERM A, D. 1927

Maggie Pearl Sharp, et al., Appellants,

vs.

Matthew S. Sharp, et al., Appellees.

Appeal from Circuit Court, Sangamon County.

ELDREDGE, J.

Appellants filed their bill for partition of certain real estate situated in the County of Sangamon, Illinois, making appellees parties thereto. The bill avers that James W. Sharp died March 29, 1908, leaving him surviving at the time of his death, his widow, Jennie Sharp, and Effie M. Sharp, Maggie Pearl Sharp and Matthew S. Sharp, his children and only heirs at law; that said children became seized in fee as tenants in common of said described premises subject only to the homestead and dower interest of Jennie Sharp. The prayer of said bill includes, among other things, the request that an accounting be made to the complainant, Maggie Pearl Sharp for the rents accrued and to accrue from the date of the death of the said James W. Sharp, though no facts are alleged in the bill as a basis for any such accounting. The defendants to the bill filed two pleas and also an answer. In the answer the defendants allege that said James W. Sharp was, at the time of his death, seized of the legal title to the premises described in the bill, but

deny that he was seized of the fee simple title to said premises and aver that the said defendant, Jennie Sharp, widow as aforesaid paid of her own money, a large portion of the purchase price at the time said premises were purchased and title taken in the name of said James W. Sharp and that said money was never repaid to her in the lifetime of James W. Sharp nor since, and aver that said James W. Sharp and said Jennie Sharp held said premises as tenants in common in equal shares although the legal title by mutual agreement between the said James W. Sharp and the said Jennie Sharp was allowed to remain in the said James W. Sharp; that such was the condition of the title to the premises described in the bill at the time of the death of the said James W. Sharp and at the time of the filing of the bill of complaint herein. There was some evidence introduced which tended to show that at the time the property in question was purchased by James W. Sharp and his wife, Jennie Sharp, that the latter paid on the purchase price the sum of \$4,000.00, which she had inherited from her father and that there was a mutual understanding between herself and her husband, in substance, that for convenience the title would be placed in him. The chancellor refused to hold that a resulting trust was created and cross errors have been assigned upon the record by appellees presenting this question. Where the issue is whether a resulting trust in real estate was created, the question

of a free hold is involved and this court is not authorized to determine that question and the appeal lies directly to the Supreme court. **Lehman et al., v. Rothbarth**, 111 Ill. 185.

It is therefore ordered that this cause be transferred to the Supreme court.

6245a

246 I.A. 635¹

General No. 8014

Agenda 3

OCTOBER TERM, 1926

William Gillum, Administrator of the Estate of Truman Gillum, deceased, Appellant.

vs.

Central Illinois Public Service Company, a Corporation, Appellee

Appeal from Coles.

NIEHAUS, J.

In this case the appellant William Gillum, as administrator of the Estate of Truman Gillum deceased, brought this suit against the appellee Central Illinois Public Service Company, in the circuit court of Coles County, to recover damages from appellee for the benefit of the next of kin of the deceased, for wrongfully causing the death of the deceased. The declaration alleges, that the deceased was killed by an electrically propelled street car under the management and control of appellee's servants on the 27th day of September, 1925, while the deceased was passing over appellee's street car tracks at the intersection of E Street in the city of Charleston. Several of the counts in the declaration charge general negligence in the management and control of the street car in question; other counts allege a failure on the part of appellee's servants operating the car, to keep a proper lookout as they approached the street crossing; and that the car was run at an excessive and dangerous rate of speed across the intersecting street in question. The fifth count charges, that the motorman who operated the car, drove the car across the street intersection "with knowledge that said electric car was approaching said street intersection and that persons might reasonably be expected to cross over said street railway at said place; and knowing of said surrounding circumstances and existing conditions; and being conscious from such knowledge, that his conduct would naturally and probably result in injury to others; and with entire absence of care for the life, person or

property of others; and with a conscious indifference and willful disregard of consequences." The trial of the case resulted in a verdict and judgment for the appellee. This appeal is prosecuted from the judgment.

The appellee at the close of all the evidence made a motion, that the court direct a verdict of not guilty, on the fifth count of the declaration charging wilfulness, and the motion was sustained; and a verdict of not guilty directed on the fifth count. This action of the court, is urged as one of the principal grounds for reversal of the judgment; error is also assigned on the giving of several instructions for the appellee, which if wrong, were prejudicial to appellant's right of recovery. One of the instructions referred to, namely the first one, given for appellee, is as follows:

"The Court instructs the jury that if they believe from the evidence under the instructions of the Court that Truman Gillum was suddenly and without negligence or fault on the part of the defendant placed in a position of danger, then in order to charge the defendant with the duty to avoid injuring the plaintiff, the plaintiff must show by the preponderance or greater weight of the evidence that the circumstances were such that the motorman of the defendant in charge of the operation of said car had time and opportunity to become conscious, by the exercise of ordinary care, of the facts giving rise to such duty, and reasonable opportunity to perform it. And if the jury further believes from the evidence, under the instructions of the court, that the circumstances as shown by the evidence did not charge the defendant with the duty as thus defined, or if the jury believes from the evidence under the instruction of the Court, that the defendant did not have a reasonable opportunity to perform by the exercise of that degree of care elsewhere required in these instructions, such duty as thus defined, then you should find the defendant not guilty."

The evidence shows, that the deceased was placed in a position of danger by walking across appellee's street car tracks on E street. It is apparent, that his walking across the tracks may have been sudden and yet it would not necessarily follow, that in suddenly crossing the tracks he was not exercising due care for his own safety. It was not claimed that the attempt of the deceased to walk across the appellee's tracks which placed the deceased in a position of danger, was due to any fault or negligence on the part of the appellee; but the instruction informed the jury, that if the deceased attempted to cross the appellee's car

tracks suddenly; and by his sudden crossing was placed in a position of danger, and that the placing himself in that position, was not the result of any fault or negligence on the part of the appellee, then in order to charge the appellee with the duty to avoid injuring the deceased, and to establish the appellant's right to recover, the appellant would have to prove by the greater weight of the evidence, that the circumstances were such that the motorman of the appellee in charge of the operation of the street car had time and opportunity to become conscious by the exercise of ordinary care of the facts giving rise to such duty and reasonable opportunity to perform it. Appellant's right of recovery did not depend on proving the matters set forth in the instruction, but depended on his proving by the weight of the evidence, that appellee's motorman was guilty of one or more of the acts of negligence alleged in the different counts of the declaration, together with the additional proof, that the deceased was in the exercise of due care for his own safety in crossing over appellee's tracks suddenly or otherwise. The instruction had the effect of raising a false issue in the case and diverting the attention of the jury from a consideration of the real issues in the case; and for that reason was erroneous.

The seventh instruction given for appellee is as follows:

"The Court instructs the jury that if you believe from the evidence, under the instructions of the Court, that as the street car approached the place of the accident it was being operated with ordinary care and that the motorman did all he could to avoid the accident in question, as soon as it was apparent or ascertainable to him, in the exercise of reasonable and ordinary care, that the plaintiff's intestate was going upon or near the track, then you should find the defendant not guilty."

It may be said concerning this instruction that the street car in question might have been operated with ordinary care by the motorman in charge and yet he might also have been guilty of negligence in running it at an illegal or excessive rate of speed as the car approached the place of injury to the deceased, and the motorman even though he may have operated the street car with ordinary care may at the same time, have failed to keep a proper lookout for persons whom he was bound to

know might cross the tracks at the point of the injury and that it was his duty to look out for. It may also be pointed out concerning this instruction, even though "the motorman did all he could to avoid the accident in question as soon as it was apparent or ascertainable to him in the exercise of reasonable and ordinary care that the plaintiff's intestate was going upon or near the track," he may have been guilty of negligence in running the car at an excessive or illegal rate of speed in approaching the crossing at which the injury occurred. The instruction is erroneous because it does not correctly state the real issues upon which appellant's right of recovery depended; and it had a tendency to direct the minds of the jurors from the consideration of the real issues in the case.

In reference to the direction of the verdict of not guilty under the fifth count, which charges wilfulness in causing the injury and death of the deceased, it is sufficient to call attention to the fact, that there is evidence in the record to show that E street is a public street; and a public crossing; and that men, women and children use this crossing frequently; also, that the view of pedestrians is somewhat obstructed in the direction from which the car in question was approaching; also that the street car which caused the death of the deceased was approaching this crossing at a very rapid rate of speed; and that the evidence tended to show, that at the time of its rapid approach, the motorman operating the car in the manner indicated was not keeping a lookout for pedestrians who might be going over the track at the crossing; but was looking in another direction and apparently giving his attention to an engine and freight cars which were moving on railroad tracks near by the place of the injury. Whether this evidence was sufficient to sustain the charge of wilfulness or reckless disregard of life, or persons, or property embodied in the fifth count, or sufficient to show a conscious indifference to life, persons or property, was a question of fact and therefore for the jury to determine. In directing the verdict of not guilty under this count, the court determined, that the evidence was insufficient,

which was a question for the jury. **McGregor v. Reid, Murdoch & Co.** 178 Ill. 464; **Libby, McNeill & Libby v. Cook** 222 Ill. 206; **Kajnick Admr, etc., v. Village of Divernon** 244 Ill. App. 7.

For the errors indicated the judgment is reversed and cause remanded.

Reversed and remanded.

Page 5

624
General No. 8019

Oct 31 1927
246 I.A. 635²
Agenda No. 7

OCTOBER TERM, 1926

Fairbanks Morse & Co., Appellee,

vs.

William Severns, Thomas Meehan and Harry G. Edwards, as Commissioners of the Valley City Drainage & Levee District, Henry B. Kilgour, Henry F. Eidmann, and William Clancy,

Appellants

Appeal from Pike.

NIEHAUS, J.

A petition for mandamus was filed in the Circuit Court of Pike County by the appellee, Fairbanks Morse Co., a corporation, against William Severns, Thomas Meehan and Harry G. Edwards, commissioners of the Valley City Drainage & Levee District. The petition prayed for a writ of mandamus to issue, directing the commissioners to forthwith proceed to issue and sell on behalf of the Valley City Drainage & Levee District, the bonds of the district in the amount of \$35,000.00; and from the proceeds realized from the sale thereof, to pay the petitioner, the full amount of the warrant which has been issued by the district upon the treasurer, and held by the petitioner; and which warrant had been issued for the payment of the balance of \$9616.67 due the petitioner and was payable to the petitioner with the bonds of the district at par or from funds derived from the sale of the bonds of the district; and that in the event the said commissioners are unable to sell said bonds in the amount of \$35000.00 for a sum equal to the par value of said bonds, that the said commissioners be directed to execute and deliver to the petitioner the bonds of said district of a par value equal to the amount of said warrant. The record discloses, that the Valley City Drainage & Levee District was organized under the Levee Act; and embraces about 5000 acres of the bottom lands lying on the west side of Pike County. The petition alleges, that the district was duly organized, and William Severns, Thomas Meehan and

Harry G. Edwards were constituted commissioners thereof; and that on August 9, 1920, an order was entered in the county court of Pike county confirming the commissioners' report and the assessments made therein against the land situated in the district amounting to \$393,036.16, to be divided into fifteen installments, the first due and payable in the year 1925; and the remaining installments due one in each year thereafter, with interest at 6 per cent per annum; and that thereafter the commissioners issued and negotiated bonds of the district in the sum of \$353,000.00, for the purpose of raising funds to pay for the construction work which the commissioners were authorized to carry out in the name of and on behalf of the district. That the bonds issued and negotiated constituted 90 per cent of the amount of the assessments mentioned. The petition further avers that on February 17, 1922, the district "entered into a written contract with William Severns, Thomas Meehan and Harry G. Edwards as Commissioners of said Valley City Drainage and Levee District, whereby petitioner agreed to sell and deliver to said District for \$28,850, certain machinery and equipment to be used in the construction and operation of said District; that hereafter petitioner delivered to said commissioners said machinery and equipment which was thereupon installed and is now held and being used by said commissioners; that thereafter certain payments were made to said petitioner by said commissioners; and on December 21, 1923, there remained yet due and unpaid the sum of \$9,616.67; and thereupon and on Dec. 21, 1923, said commissioners executed and delivered to petitioner a warrant as follows:

"December 21, 1923.

151233

Treasurer Valley City Drainage and Levy District
Pay to the order of Fairbanks, Morse and Company
\$9,616.67

Nine Thousand Six hundred sixteen and 67-100 Dollars

This warrant is payable only with the bonds of the Valley City Drainage and Levy District, in the County of Pike, and State of Illinois, at par, or from funds derived from the sale of said bonds.

By order of the Board of Directors.

(Signed) H. G. Edwards, Secretary

W. E. Severns, Chairman.

151244"

Page 2

That thereafter the commissioners filed their petition in the county court, representing, that it was for the interests of the district that money should be borrowed to an amount exceeding 90 per cent of the assessment installment unpaid; and that the county court thereupon entered the following order on December 5, 1923:

“And the Court doth further find, that it would be to the best interests of the said Valley City Drainage and Levee District to issue and sell bonds in the sum of Thirty Five Thousand Dollars (\$35,000.00) based on and made a lien upon the ten per cent (10 per cent) balance remaining of the original assessment heretofore levied against the lands of the said District.

It is, therefore, ordered, adjudged and decreed by the Court that the commissioners of said District be, and they are hereby directed to issue bonds of said District in the sum of Thirty-five Thousand Dollars (\$35000.00), against the excess of Ninety Per cent (90 per cent) of the installments of the original assessment levied against the lands of said District and in the original proceedings for the organization of District, that said bonds be, and the same are hereby made a lien upon the excess of Ninety per cent (90 per cent) of the installments of the original assessment, and that the Commissioners be, and they are hereby directed to proceed to execute, issue and sell said bonds.”

The petition also avers, that all of the funds derived by said commissioners from the sale of said bonds in the aggregate amount of \$353,000.00, have been expended by said commissioners who are now without funds to pay said warrant held by the said petitioner, who has repeatedly requested said commissioners to pay said warrant in the amount thereof; or in the event said commissioners are without funds, that they deliver to petitioner bonds of said district of a par value equal to \$9,616.67, together with interest thereon from the 21st day of December, 1923; and that said commissioners without assigning any reason for their action and without denying that said warrant is due and owing, have failed and refused to pay said warrant or to deliver bonds of said district. Petitioner has repeatedly requested said commissioners to execute, issue and sell bonds of said district in the amount of \$35,000.00 as authorized by said order of the County court and from proceeds received from sale to pay said warrant but that said commissioners, without assigning any reason for their action and without denial of the obligation of the said warrant, have failed and refused and now fail and refuse to execute, issue and sell said bonds of said district in \$35,000.00.

It may be pointed out in this connection, that the legal propriety of the county court's proceeding for the issue and sale of bonds for the remaining 10 per cent of the assessment under similar circumstances was passed on and determined in **Broadway Bank v. McGee Creek Levee & Drainage District** 292 Ill. 560. The commissioners filed their answer to the appellee's petition, in which they admit all the material averments of the petition concerning the organization of the district, the appointment and qualification of the commissioners, the election of the officers of the district, the examinations of the land by them and their report of the assessment roll; and the confirmation of the assessments of \$393,036.16, which was made payable in fifteen installments. They also admit, that they issued and negotiated bonds amounting to \$353000.00 for funds to carry on the construction work of the district; and admit, that they entered into contract with the appellee for the delivery and installation of machinery for the district amounting to the sum of \$28,850.00, which was duly delivered and installed by appellee; and that the \$9,616.67 here involved is the unpaid balance due the appellee under the contract, for which the district issued a warrant on the treasurer of the district in order to pay said balance "with bonds of the district at par or from funds derived from the sale of said bonds." They also admit, that the County Courts proceedings were had at their instance for authority to issue and sell bonds in excess of the 90 percent of the assessments which had been levied, namely for the total sum of \$35000.00; and that prior thereto, they had expended all the funds derived from the sale of the \$353,000.00 bonds issued by them; and that they were without funds to pay the warrant issued to the appellee, or to deliver to the appellee bonds of the par value to pay their warrant; and they also aver, that they have been unable to sell the bonds ordered by the county court to be issued and sold, or any part thereof; and for that reason have been unable to pay appellee the amount of its warrant. There is also an averment in the answer, that there are

other valid claims against the district amounting to more than \$35000.00; and that it would be unjust to the other creditors holding such claims to deliver to the appellee bonds at par value for the payment of its warrant, because they would then be unable to pay the other claims against the district in full. The answer of the commissioners does not state any facts, which can be regarded as a legal defense to the petition for mandamus. The allegation in the answer, that they were unable to sell the bonds is merely a conclusion; and no facts are stated to show, that this conclusion is justified; nor does the answer show, that the bonds have been executed in proper form and in a condition for sale; or that any attempt on their part has been made to sell them. We conclude therefore, that the court properly sustained the demurrer to the answer of the commissioners. The legal propriety of this action by the court however, is not before us for review because no appeal has been prosecuted from this order of the court. The parties prosecuting this appeal are Henry B. Kilgour, Henry F. Eidman and William Clancy, who represent, that they hold \$315,000.00 of the original 90 percent bond issue of the district; and that this bond issue is a first lien on 100 per cent of the assessments levied; and that therefore as holders of a large part of this bond issue they claim the right to intervene and contest appellee's right to a writ of mandamus herein. The record discloses, that the appellants named, by leave of court filed an answer to the petition for mandamus. Concerning this answer, it may be said, that it shows upon its face, that this proceeding doesn't in any way affect or impair the rights of appellants to priority to payment from the assessments levied of the bonds held by them, or the interest accruing thereon; nor does it in any way abridge or interfere with any legal remedies to which they are entitled in the enforcement of their rights to full payment; and we conclude therefore, that insofar as it concerns the appellants, this proceeding is inter alios acta; and there is nothing in this proceeding to adjudicate which affects their rights; and that therefore they were not legally entitled to interplead, **Mansfield v. Hoagland** 46 Ill. 359. The answer which the appellants filed does not deny any of the material facts alleged in the petition;

nor does it aver any matter which could become an issue in the case. It is apparent from the record, that the court sustained a demurrer to the answer of the appellants, and so far as we are able to determine the matter, we conclude, that the demurrer was properly sustained; but the demurrer is not set out in the abstract; and it does not appear therefore whether the demurrer which the court sustained was general or special; or if a special, what the special grounds were. Inasmuch, as the demurrer is not set out in the abstract, the abstract does not comply with the requirements of Rule 22 of this Court and therefore the errors assigned by the appellants on the sustaining of the demurrer are not properly before us for review. The latter reason alone is sufficient ground for affirmance of the judgment. The judgment is affirmed.

Affirmed.

6247a
246 I.A. 635³

General No. 8065

Agenda No. 5

APRIL TERM, 1927

Roy R. Duff, Appellant.

vs.

W. W. Dye, Appellee.

Appeal from Vermilion.

NIEHAUS, J.

Roy Duff, the appellant sued the appellee, W. W. Dye, to recover back \$100.00 which he alleges, he paid to Mary E. Durkin as part payment on the purchase price of certain real estate owned by Miss Durkin, situated in the city of Danville. The proof is clear, that the appellee received the money from the appellant as the agent of Miss Durkin; and receipted to the appellant for the same as agent for Miss Durkin; and the appellant knew that the appellee in receiving the money was acting as agent merely.

There was a trial of the case in the circuit court in Vermilion county on an appeal from the justice court. The court found, that the appellant had no right to recover under the facts as stated, and rendered judgment accordingly. This appeal is prosecuted from the judgment rendered.

It may be said concerning appellant's contention that under the facts in the case, the right of appellant, if any he had, to recover back the \$100.00 which he paid on the purchase price of the property from Mary E. Durkin, would be against Miss Durkin; and not against the appellee, the agent for Miss Durkin in negotiating the sale of the property to the appellant. We conclude therefore, that the judgment was not erroneous but in conformity with the law and the evidence. Appellant raises a question about the refusal of the court to hold certain propositions of law; but he does not specially point out what propositions are referred to; nor in what respect the refusal of the court is erroneous. No propositions of law appear in the bill

of exceptions. These matters are therefore not before us for consideration and review. For the reasons stated, the judgment is affirmed.

Judgment affirmed.

6246a

246 I.A. 635⁴

General No. 8085.

Agenda No. 20.

APRIL TERM, 1927

Ray Spicer, Appellant,

vs.

J. W. Thrasher, Appellee.

Appeal from County Court of McDonough County.

NIEHAUS, J.

This cause concerns the rights of property in 234 bushels and 36 pounds of shelled corn. There was a trial of the rights of property in the county court of McDonough county at the instance of the appellee, J. W. Thrasher, who claims property rights in the corn by virtue of a contract of sale made with Sid Johnson, the owner of the corn; which contract it is insisted was carried into effect on January 4, 1927. The appellant, Ray Spicer, claims the corn under a levy made by the sheriff of McDonough county under an execution issued upon a judgment for \$1304.26, which was recovered by him in the circuit court of McDonough county against Johnson. The trial court found the rights of property in favor of the appellee and rendered a judgment accordingly; and thereupon directed a release of the levy made by the sheriff. This appeal is prosecuted from the judgment.

The evidence shows, that there was a sale of the corn in question on January 4, 1927, by the then owner thereof, Sid Johnson, to the appellee under the terms of a written agreement made by the parties for that purpose, on December 20, 1926; and that the sale was consummated by the delivery of the corn by Johnson to the Farmers Elevator at Macomb for the appellee; and that the Farmers Elevator accepted the corn for the appellee by the virtue of a previous arrangement between the appellee and the manager of the elevator. The evidence also shows, that the delivery of the corn to the elevator for the appellee was completed before the execution under which the levy was made, came into the hands of the sheriff. In this condition of the record, we are of

opinion, that the corn became the property of the appellee at the time of its delivery at the elevator, and was the property of the appellee before the execution referred to had reached the hands of the sheriff; and we conclude, therefore, that the finding and judgment was proper; and the judgment is affirmed.

Judgment affirmed.

6249a
246 I.A. 635⁵

General No. 8106

Agenda 38

APRIL TERM, A. D. 1927

Theodore Oltmann, Appellee.

vs.

Rudolph H. Coorts, Appellant.

Appeal from Logan.

NIEHAUS, J.

This is a suit brought in the circuit court of Logan county by the appellee Theodore Oltmann against the appellant Rudolph H. Coorts, who owned an elevator in the village of Hartsburg, which was used and operated by him for the purposes of his business, namely the buying, selling and storing of grain. This suit is based on a claim of the appellee to recover the amount of the purchase price of $661\frac{1}{2}$ bushels of wheat, which the appellee delivered to the appellant at his elevator; and which he alleges was afterwards sold to the appellant at \$1.50 per bushel. There was a jury trial, which resulted in a verdict in favor of the appellee; and the jury assessed his damages at \$792.25; the full amount of appellee's claim. A motion for a new trial was made by the appellant and denied by the court; and thereupon a judgment was entered in accordance with the verdict, for the amount found by the jury. This appeal is prosecuted from the judgment.

There are several errors assigned and urged for reversal of the judgment. It is insisted, that the testimony of the witness George Brahm was erroneously admitted in evidence. In reference to this point, attention must be called to the fact, that the abstract does not show, that any objection was made to the admission of Brahm's testimony at the trial. Objections to the admissibility of evidence at the trial cannot properly be raised for the first time in a court of review; and this question is therefore not before us for consideration. It is also insisted, that there was error in the giving of instructions, 3, 4, 5 and 6 for the appellee, for the alleged reason, that these instructions do not give a

correct legal definition of what constitutes a public warehouse of class B. An examination of this matter leads us to the conclusion that appellant's criticism of the instructions on this point, is not well founded. And it must also be pointed out, that instruction marked 3 given at the request of the appellant, contains substantially the same definition of what constitutes a public warehouse of class B which is contained in the instructions referred to; and that therefore the appellant is not in position to question the correctness of the definition. Moreover the contention in this case about what constitutes a public warehouse of class B is merely incidental to the real issue in the case, which was passed upon by the jury, namely whether appellant purchased the wheat in question from the appellee at \$1.50 per bushel. This question is a question of fact and within the province of the jury to determine. Appellant contends, that the verdict is contrary to evidence on this issue. We cannot agree with appellant in this contention. The question referred to, was a controverted matter; and the appellant and appellee contradicted each other in their testimony concerning this controverted matter. The evidence in the record fully warranted the jury in finding that there was a sale of wheat to the appellant at the price mentioned.

We find no reversible error in the record and judgment is therefore affirmed.

Judgment Affirmed.

6250a

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Agenda No. 48.

Appeal from the
Circuit Court of
McDonough County.

This cause, pending in this court on appeal from the granting of a temporary writ of injunction, has also been pending upon appeal in the Supreme Court from a final decree upon the merits of the suit. In view of the determination of the cause in the Supreme Court and opinion filed June 22, 1927, and a rehearing denied October 5, 1927, McGee v. Vandeventer, 326 Ill. 425, reversing the decree of the lower court and remanding the cause, with directions to sustain the demurrer to appellee's bill of complaint, this court likewise reverses the decree of the Circuit Court of McDonough County granting a temporary writ of injunction.

Reversed.

*W. H. ...
affiliated to ... - White ... & ...
Hill ... - ...*

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

NO. 1

Robert H. ...
CLERK OF THE ...
FOURTH DISTRICT OF ILLINOIS

MARCH TERM, A. D. 1927.

TERM NO. 27.

AGEDNA NO. 30.

246 I.A. 636 2

FLOYD R. SUMPTER,
Appellee,

VS.

PENNSYLVANIA RAILROAD CO.,
Appellant.

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:
:
:

APPEAL FROM THE CITY COURT
OF EAST ST. LOUIS, ILLINOIS.

BARRY, P. J.-

Appellee, while in the employ of appellant, was thrown from a hand car, and in a suit, under the Federal Employers Liabilities Act, recovered a verdict and judgment for \$25,000.00 for injuries alleged to have been occasioned thereby.

In the first count of his declaration he charged appellant with negligence as follows:- "The said defendant, through its foreman and agent, negligently, carelessly and improperly placed, or caused to be placed, a certain rail jack so near the forward end of said car and in such a dangerous position that the said foreman and agent of the defendant then and there, or with the exercise of due care and caution should have known, that a jar from said moving car, or a sudden application of the brakes, would cause the said jack to fall from said car and derail the same; that the plaintiff then and there did not know of such dangers, as aforesaid and that due to the negligence of the defendant aforesaid and as a direct and proximate result thereof, through the said falling of the rail jack, the said car in which the plaintiff was riding, as aforesaid, was derailed and the plaintiff was thrown down with great force and violence, etc."

It will be observed that the only negligence charged in that count is with reference to the position of the jack upon the car.

There is no averment that the jack fell off the car by reason of a jar of the moving car or as a result of a sudden application of the brakes. It simply avers that through the said falling of the rail jack, the said car in which the plaintiff was riding, as aforesaid, was derailed, etc.

We find no evidence in the record to the effect that the fall of the jack derailed the car. A witness for appellee testified:- "We were traveling east on the west bound track, and the jack slipped off the car and Walter Wright stepped on the brakes and threw us off." Another witness for appellee testified:- "We were going at a rate of five or six miles an hour and the foreman hollered 'whoa', and applied the brakes and the jack fell between the rails and the car jumped the track." He further stated on cross examination:- "The brake was applied and the jack fell between the rails. The jack and Sumpter fell practically at the same time." The same witness was asked on re-direct:- "Q - Do you know of your own knowledge what caused this car to be derailed? A - Applying the brakes was the cause of it." Appellant objected to the question and answer and moved that they be excluded for the reason that it is at variance with each and every count of the declaration. The objection was overruled. The witness was then asked to explain to the jury how that caused the car to be derailed. His answer was:- "The brake was applied going at such speed that it jumped the track - the jack fell off when the brake was applied all at once."

In their statement of the case counsel for appellee say that as the men were traveling on this hand car east along the west bound track the assistant foreman of appellant, without any warning, slapped on the brakes, the jack fell between the rails, and the car was derailed and all of the men on the front end of the car were thrown off. They further say that the evidence shows that the men were thrown from the car as alleged in appellee's first count by reason of the jack falling and by

reason of the assistant foreman suddenly applying the brakes. They point out no evidence that the falling of the jack had anything to do with the derailment of the car. They say, in their argument, that the first count of the declaration charges that appellee was injured by reason of the negligence of the assistant foreman who made a sudden application of the brakes on the hand car, thus throwing appellee and the other men off who were on the forward end of the car.

If appellee desired to rely upon the alleged negligence due to the sudden application of the brakes he should have amended his declaration when an objection was raised to the introduction of such evidence on the ground of variance. He says that appellant has not preserved the question of variance. The question was raised upon the trial and objection made to the introduction of evidence on the ground of variance and the motion for a new trial and the assignment of errors raised the question that the Court erred in the admission of evidence. While the word "variance" is not used in the motion for a new trial or in the assignment of errors, yet the objection to the testimony was based upon that ground and we are of the opinion that appellant has not waived that error. Evidence to the effect that the car was derailed by reason of the sudden application of the brakes does not support the first count of the declaration.

In the second count of the declaration it is charged that defendant carelessly and negligently permitted the hand car to become and remain in a state of disrepair, in that the axle and two wheels were loose, out of line, and in such a disjointed condition as to cause the said car to be derailed and thereby rendering it dangerous for plaintiff to ride upon; that the said dangerous condition was well known to the said foreman and agent of the defendant and wholly unknown to the plaintiff; that while the plaintiff was then and there, with due care and caution, being conveyed upon the said hand car, as aforesaid, due to the

negligence of the defendant aforesaid, and as a direct and proximate result thereof, the said car was derailed, etc.

The accident in question occurred on June 8, 1926. Walter W. Morris had worked for appellant and used this same hand car but had quit work on May 28th, 1926. He was called as a witness by appellee and was permitted to testify, over objection, that on May 28th, the two front wheels and the axle were very loose; that they had been hauling some rails t on this hand car and the car had jumped the track five times within fifteen minutes. Appellant objected to the question and moved that the answer be excluded. The Court instructed the jury to disregard the answer as to the car jumping the track five times. The witness was also permitted to testify, over objection, that a few days before he left the employ of appellant he told the assistant foreman that some one would get hurt with the car in that condition. Another witness called by appellee testified that the car was in use by appellant from the time Mr. Morris quit working on May 28th up to the day appellee was thrown therefrom.

Appellee offered no further testimony in support of the second count of his declaration. His counsel, in the closing argument to the jury said:- "Let's get down to the car; let's see if we have proven our charges about the jack and the car; the testimony is that it jumped the track five different times one day and that was just about three weeks before." An objection was made to that argument on the ground that the evidence referred to had been excluded. The court sustained the objection and instructed the jury to disregard the statement. Counsel for appellee then suggested that the Court had afterwards permitted that evidence to go in as showing knowledge of defects and thereupon the Court changed its ruling and allowed the argument. The record shows that the evidence referred to had been excluded and the argument was highly improper. No witness

testified that the car was not repaired between May 28th and June 8th, and yet counsel seem to argue, in this court, that no repairs were made. There is no other evidence in the record upon which to base a conclusion that the car was out of repair at the time of the accident. There is no evidence tending to show that the car jumped the track because it was out of repair. If we were to presume that because the car was in a defective condition on May 28, it continued in that condition until the time of the accident, it would be wholly insufficient to support a judgment. After indulging in that presumption it would be necessary to further presume that the car was derailed by reason of its alleged defective condition. That would be basing a presumption upon a presumption, which is not permissible, Globe Accident Insurance Company, vs. Gerisch, 163 Ill. 625.

It is unnecessary to refer to the third and fourth counts of the declaration because of the fact that it is not even suggested by appellee that those counts were proven. We might say, however, that we have carefully examined all of the evidence and are satisfied that those counts were not proven.

At the request of appellee the Court instructed the jury as follows:- "The Court instructs the jury that at the time and just prior to the day of the injuries in question to the plaintiff, there was, and still is, in full force and effect an act of Congress of the United States which provides that every common carrier by railroad, while engaged in commerce between any of the several States or Territories, shall be liable for damages to any person suffering injury while he is employed by such common carrier in such commerce, when such injury results in all or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment."

follow any" or anybody if they thought they could get something to eat. They would follow my wife around. That is one reason she had to shut them up." He further testified that Estes told him that he had 16 goslings in the pen. A few days later I passed there and counted 22 head. I asked Estes where he got the balance and he said his wife hatched out some more. I really thought and believe that all the goslings we had there were ours."

Thurel Harre, daughter of plaintiff in error, testified: "The goslings in the pen were ours. They had been hatched out and raised there on the farm." James Harre, a son of plaintiff in error, testified: "Know our folks raised some goslings. They ran all over the place. I dont know the goslings were taken away. I had seen them before they were taken away, several days before."

If there were no other errors in the record the evidence on which this verdict and judgment is based is so conflicting and unsatisfactory we could not let it stand.

The court gave the following instruction:

"Exclusive possession, shortly after the commission of a larceny or burglary, of stolen property, the proceeds of the crime, if unexplained, may^{of} itself raise an inference of guilt of the person having possession, sufficient to authorize a conviction in the absence of any other evidence of facts or circumstances in evidence which leaves in the minds of the jury a reasonable doubt as to the guilt of such person."

While this instruction states a correct principle of law, the evidence on the part of the People did not warrant the giving of the same, for the reason that plaintiff in error did not have that character of possession which the law contemplates is necessary in order to warrant a conviction on that ground.

Appellee contends that the giving of this instruction was fully warranted by Devine vs. C. R. I. & P. R. R. Co., 266 Ill. 248 and other cases. While the giving of a somewhat similar instruction in those cases was held not to be error, yet the court referred to the fact that other instructions were given which informed the jury as to what facts had to be proved in order for the plaintiff to recover. In the case at bar the instruction assumes that the plaintiff was injured and no other instruction was given as to what facts must be proved to entitle the plaintiff to recover. In view of this situation the instruction should not have been given.

During the taking of evidence many objections were made by counsel on either side. The record discloses that counsel addressed their objections to opposing counsel and in some instances the Court called attention to this fact and reminded counsel that they should address their objections to the Court. Such a practice should not be permitted and if lawyers persist in it the Court should exercise its power and authority.

On cross-examination of a witness for appellee counsel for appellant asked the witness if he did not at a certain time tell Mr. Blair that there wasn't anything wrong with appellee and that the witness had sent counsel for appellee a \$10,000.00 case. The witness answered that he didn't. The Court then stated to the attorney that it was very improper unless he expected to follow it up; that if he had some testimony to sustain that he might continue, but if he didn't expect to offer some testimony on which to base those questions, it was very improper practice to get stuff of that kind in the record in that manner. This particular remark should not have been made as counsel had a right to inquire as to those matters for the purpose of showing the interest or bias of the witness. At another time counsel for appellant inquired of appellee and his attorneys, while appellee was on the witness-stand, as to whether

he would submit to a medical examination; this was highly improper and the Court should have put an end to that matter immediately, Mattice vs. Klawans, 312 Ill. 299. The attitude of counsel on either side during the trial of the case was highly calculated to embarrass the Court and provoke remarks.

During the closing argument to the jury counsel for appellee made statements in regard to matters not in evidence. Objections were sustained but counsel persisted in restating substantially the same matter and objections were again sustained. We would call attention to the fact that it ^{is} error sufficient to reverse a judgment to permit an attorney to argue against objection, matter not in evidence and pertinent to the issue or to assume facts as proved when they are not. Where such a course is pursued with success the proper remedy is to require the successful party to re-try his case, even though objections were sustained to the improper argument; Mattice vs. Klawans, 312 Ill. 299; Emich vs. Citizens Trust & Savings Bank, 321 Ill. 518.

Appellant contends that the verdict is excessive. Appellee was 41 years of age at the time in question and was employed as a section hand at \$3.20 per day. If he were employed at that rate during every working day in the year his wages for the year would be less than \$1,000.00. The verdict is for \$25,000.00. The interest on that amount would be at least \$250.00 per year more than appellee was earning. In view of these facts we are of the opinion that the verdict is excessive. If that were the only error in the record we might remedy it by requiring a remittitur, but as appellee failed to prove the negligence averred in any count of his declaration the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.



*Wm. F. Williams
Appellate City - Chicago - 1st District
Hill - 1st District*

FILED

NOV 5 1927

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

MARCH TERM, A. D. 1927.

TERM NO. 31.

AGENDA NO. 40.

A. H. BURNS,
Appellee,

VS.

WILLIAM FULTON,
Appellant.

246 I.A. 636³

APPEAL FROM THE CIRCUIT COURT

OF RANDOLPH COUNTY.

NEWHALL, J.-

Appellee recovered a judgment in the Circuit Court, on appeal from Justice Court, against appellant in the sum of \$41.70 for feed delivered to and ordered by one R. J. Smith, who appellee claims was the agent of appellant; and that such feed was consumed by appellant's horse, then in the custody and control of Smith.

Appellee is a dealer in feed at Sparta. In January, 1923, Smith opened an account with appellee for feed to be charged to appellant, and such feed was delivered to Smith's barn at Sparta on several occasions extending over a period of six months.

There was no direct evidence by appellee that appellant had ever authorized appellee to furnish such feed, or knew that the same was being furnished at the time of delivery thereof. On the trial before a jury, appellee was permitted to testify, over objections, to the declarations of Smith, made in the absence of appellant, to the effect that Smith had been authorized to purchase such feed and charge the same to appellant's account.

The testimony offered by appellant tended to show that Smith had been allowed to take certain horses from the farm of appellant, and drive the same for his own purposes; that, in the fall of 1922, an arrangement was made between Smith and appellant, who lives on a farm in Perry County, whereby Smith was to take a

horse and keep him during the winter to drive for his own use; that Smith was to take from appellant's farm whatever feed was necessary for this horse; that he did go to the farm and obtain two loads of feed, which he hauled to Sparta; that appellant did not know that Smith had obtained feed at appellee's store until the fall of 1924, when appellee informed appellant. In May, 1925, appellee sent appellant a statement of account, which he refused to pay.

On the trial, appellee based his right to recover upon the theory that Smith was the agent of appellant in buying the feed in question, and what was said and done by Smith, the alleged agent, was admissible.

Smith died prior to the trial; and his declarations, made in the absence of appellant, were not competent evidence to establish the agency or extent of his authority. Proctor vs. Towne, 115 Ill. 138; Merchants National Bank vs. Nichols & Shepard Co., 223 Ill. 41; Murray vs. Standard Pecan Co., 309 Ill. 226.

There was no other competent evidence in the record showing the existence or ratification of any agency on the part of Smith, which would bind appellant for payment of the bill in question. The admission in evidence of statements of Smith, testified to by appellee, was error.

For the reasons stated, the judgment is reversed and cause remanded for new trial.

REVERSED AND REMANDED.

Not to be reported.

Judge. Louis R. ...
Appellants atty. - Terry, Kullberg & Powell
Appellee - R. Ferd Tunnell, Jr.

FILED

NOV 5 1927

Robert B. Noe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

MARCH TERM, A. D. 1927.

TERM NO. 75.

AGENDA NO. 38.

R. F. TUNNELL,
Appellee,

VS.

ALTON BRICK COMPANY,
Appellant.

WILLIAMS, J. -

246 I.A. 636⁴

APPEAL FROM THE CIRCUIT
COURT
OF MADISON COUNTY.

Appellee commenced a suit against appellant before a justice of the peace and after a change of venue and before trial, upon appellant's request, was required by the justice who tried the case, under section 19 of article V of the Justice Act, to exhibit the nature of his demand in writing, whereupon he filed the following statement or bill of particulars: "Damages to chimneys on residence of R. F. Tunnell, Edwardsville, Illinois, caused by blast of Alton Brick Company, on or about the 30th day of June, 1925, the itemized bill below being for said repairs;" following which appears separate items for labor, insurance and tools and various materials, the whole amounting to \$123.70. Upon trial on appeal to the circuit court of Madison county, a verdict was returned against appellant for the full amount of the claim, the court entering judgment thereon for \$100.00 after appellee had entered a remittitur of \$23.70.

Appellant operated a plant in the city of Edwardsville, Illinois, and in connection therewith used dynamite and blasting powder in getting out shale used in the manufacture of bricks, appellee's house being situated about 1750 feet from such plant. There were three chimneys on the house, each of them being about thirty-five feet in height from the ground, the center chimney extending twelve feet and the other two about six feet

above the roof. They were constructed with walls of single thickness of four inch brick and were not lined, the tops having corbelling, that is an extra thickness of brick built by extending the four or five upper courses outwardly and thus forming a head held together with mortar, in the preparation of which lime was used instead of cement as now used. The center chimney was the largest and had a partition in the middle so as to make two flues which were plastered on the inside, one being connected with the furnace and the other with an open fireplace, the remaining chimneys being single flues.

On the trial in the circuit court appellee and one witness testified that on June 30, 1925, while they were in the yard adjacent to appellee's house there was a very severe "blast" at appellants plant, after which some bricks fell from the center chimney to the roof, causing a hole in the chimney which could be seen from the ground. The proof does^{not}/show that either of these witnesses or any other witness noticed any damage to either of the other chimneys following this explosion and, so far as is disclosed by the evidence, no further examination was made of any of these chimneys prior to their repair in February of 1926, nor is there any evidence in the record, aside from the testimony of the contractor hereinafter referred to, tending to show the condition of any of these chimneys prior to June 30, 1925. In January of 1926 appellee employed one Agles, a contractor, to repair all the chimneys and ordered him to do all the work necessary to make good flues out of them, and during the following month Agles commenced the work. He found the upper two feet of the center chimney to be loose and the middle partition out of position, the tops of the other two broken in places, part of the plaster on the inside of the middle chimney and some of the mortar between joints from the roof to the tops of all the chimneys gone or deadened, the middle chimney being in the worst condition in this regard. The contractor who had had fourteen years experience

in work of this kind, testified that from appearance all the chimneys had been built for about twenty-five years and had never been tuckpointed or repaired; that twenty-five years would be the life of such chimneys without repair; that heat causes the bricks to expand and the mortar to rot or deaden; that chimneys built with corbelling are more likely to get out of repair than those built with straight walls; and that weather conditions, heat and cold, first affect the tops of chimneys. There is no evidence in the record which tends to contradict this testimony, but same, so far as it pertains to the effect of long use of such chimneys without repair, is corroborated by other witnesses. Appellant also produced evidence tending to show that the effect of a ground explosion is first seen in the foundation of a building, and that an examination of appellees house disclosed no evidence of injury to the foundation thereof, and this evidence is also uncontradicted. The contractor built scaffolding around each of the chimneys, tore down the tops of all of them, removing about two feet of the center chimney and a trifle less of the other two, replastered the inside of the center chimney and re-pointed it, tuckpointed all of them, that is refilled joints with mortar where same was out, doing everything necessary, as directed by appellee, to make good chimneys. His charge for the entire work was the amount shown by appellees statement of claim, and there is no evidence in the record tending to show the separate cost of any particular part thereof.

Appellant first contends that the verdict and judgment are not supported by a preponderance of the competent evidence and we agree with such contention. It must be apparent that even if the evidence does furnish to appellee a basis for a claim for damages against appellant, the judgment is clearly in excess of any damage shown by the evidence to have accrued to appellee by reason of the explosion in question. While the evidence does show some injury to the center chimney by reason of the explosion, the pre-

ponderance of the evidence does not show that the condition of the other two as found by the contractor was a result thereof, and under this record it is clear that the repairs went beyond any injury to these chimneys which could possibly have resulted from the explosion and extended to those made necessary by long use and natural deterioration. The court recognized that appellant would not be liable for the cost of the repairs last mentioned and, at appellant's request, so instructed the jury, but in view of the fact that there is no evidence in the record under which the cost of repairs which may properly be chargeable to appellant can be ascertained it follows that the judgment should have been confined to nominal damages.

Other errors are assigned and argued by appellant, none of which are discussed or referred to in appellee's brief and argument and no authorities are cited therein. Over the objection of appellant the court permitted appellee to testify as to the severity of an explosion at appellant's plant which occurred a week after the explosion in question and the effect of same upon his barn. The court also, over appellant's objections, permitted witnesses produced by appellee to testify as to the effect of the explosion in question, as also the effect of other explosions at appellant's plant, both prior and subsequent to that in issue, upon their respective houses situated at various distances from appellee's property, and motions to exclude some of such evidence were denied. All of this evidence was improperly admitted, as it would tend to introduce collateral issues likely to mislead and confuse the jury. *FitzSimons & Connell Co. v. Braun & Fitts*, 199 Ill. 390.

Appellant further contends that the court erred in permitting appellee to prove by parol evidence that he was the owner of the premises upon which the house in question was situated. If it be conceded that appellee was required to make proof of ownership to the same extent and in the same manner as if the issues had been presented by written pleadings and a special plea denying ownership filed, and we think this the rule as announced in the

early case of *Proctor v. Town of Lewistown*, 27 Ill. 414, the question raised is not material in view of the fact that the record discloses that appellee subsequently testified, without objection, that he had owned the property since 1880, and he further testified that he had lived in the house since that date, with the exception of four or five years, and had continuously lived therein for twenty-five or thirty years preceding the date of the trial.

Appellant complains that the jury was not instructed relative to the proper measure of damages. It is evident that appellee proceeded upon the theory that the measure of damages would be the reasonable cost of repairs necessary to place the chimneys in the condition they were in prior to the alleged injury, and appellant's 4th instruction given to the jury inferentially recognized that such measure of damages should be applied. This is in accord with the rule announced in the case of *FitzSimons & Connell Co. v. Braun & Fitts*, supra, which is cited in appellant's brief upon the question. While no instructions whatever were offered by appellee it was not incumbent upon the court to prepare and give an instruction upon this question. We have referred to this contention notwithstanding appellant's assignment of errors does not cover same, and we also note that while the Supreme Court in *Peck v. City of Chicago*, 270 Ill. 34, overruled the *FitzSimons* case so far as the rule referred to was there applied, it was only for the reason that the case was one wherein damages were claimed on account of the prosecution of work connected with a public improvement and no question of negligence was involved.

The court refused two instructions offered by appellant. The first, in effect, advised the jury that a verdict for only nominal damages should be returned by reason of the fact that appellee had offered no evidence of the value or condition of the chimneys prior to the alleged injury. Instruc -

tions should be based upon all the evidence and appellant produced evidence tending to show the condition of these chimneys at the time mentioned. The instruction was not based upon the failure of the evidence to show the separate cost of such repairs as might be necessary by reason of the alleged injury, and we think the court did not err in refusing same. The second refused instruction had the effect of minimizing the alleged injury to appellee's chimneys, and the material part thereof was covered by other instructions which advised the jury that appellant was only liable for such damage as would accrue by reason of the explosion in question, and was properly refused.

For the reasons given the cause is reversed and remanded.

REVERSED AND REMANDED.

Not to be reported.

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III. Unpublished opinions

246

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12-5	N. J. [unclear]	832-322	
2/12/73	H. [unclear]	372-0344	
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